No. 91-2014

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1991

O'NEILL GROUP, et al., *Petitioners*

v.

CONTINENTAL AIRLINES CORP., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Under Chapter 11 of the Bankruptcy Code, when an employer who is a debtor in possession rejects its collective bargaining agreements with its employees, the employees are entitled to contract rejection damages. In this circumstance:

1. Must the employees forego their right to strike in order to preserve their entitlement to contract rejection damages?

2. Should contract rejection damages be limited by the hypothetical period the employer would have stayed in business if it had not rejected its collective bargaining agreements, even if the employer in fact stayed in business and even if rejection damages for other types of creditors are not so limited?

LIST OF PARTIES

Petitioners in this Court, appellants in the Fifth Circuit Court of Appeals, are several hundred past or present pilots and flight attendants of Continental Airlines, Inc. ("Continental"). They are denominated as "petitioners" or "the O'Neill Group" in this petition. Petitioners filed an Application to Extend Time to File a Petition for Writ of Certiorari on January 8, 1991, and the Court granted the application on January 9, 1991 (No. A-528). Annex A to that Application lists all of the petitioners.

RULE 29.1 STATEMENT

This petition is not filed by or on behalf of any corporation.

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The O'Neill Group hereby petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit in the case known there as No. 89-2347, *In re Continental Airlines Corp.*

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit is reported at 901 F.2d 1259 (5th Cir. 1990) (hereafter cited as Appendix A). The Court of Appeals issued an unreported order denying timely petitions for rehearing and suggestions for rehearing *en banc* (Appendix G). The March 13, 1989 order of the United States District Court for the Southern District of Texas in this case is reproduced in Appendix E. The opinion and judgment of the United States Bankruptcy Court for the Southern District of Texas (Appendix D) is reported at 64 B.R. 865 (Bankr. S.D. Tex. 1986).

JURISDICTION

This case concerns Continental's conduct in connection with its first bankruptcy petition, which was filed in the United States Bankruptcy Court for the Southern District of Texas, No. 83-04019-H2-5, on September 24, 1983. The opinion and judgment of the Fifth Circuit were entered on May 25, 1990. During the period otherwise allowed to petitioners to petition for a writ of certiorari, Continental filed a second bankruptcy petition in the United States Bankruptcy Court for the District of Delaware, No. 90-932. To permit petitioners to confirm that this second bankruptcy petition stayed the present case pursuant to the automatic stay provision of the Bankruptcy Code, this Court, on January 9, 1991, extended the time for filing a petition for a writ of certiorari to March 28, 1991, No. A-528. On March 21, 1991,

the Fifth Circuit confirmed that Continental's second bankruptcy stayed the appellate proceedings arising from the first bankruptcy (Appendix H). Accordingly, the time for petitioning has been automatically extended pursuant to 11 U.S.C. § 108(c)(2).

Within the extended time this Court otherwise allowed to petition for a writ of certiorari, petitioners moved the Bankruptcy Court for the District of Delaware to lift the automatic stay (Appendix I). The Bankruptcy Court granted this motion for the limited purpose of permitting this petition for a writ of certiorari on May 12, 1992 (Appendix J). Therefore, this petition is filed within the time period specified by 11 U.S.C. § 108(c)(2), and this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of the Bankruptcy Code, 11 U.S.C. §§ 365 and 502, and the Railway Labor Act ("RLA"), 45 U.S.C. §§ 152, 155, and 156, are set forth in full in Appendix K.

STATEMENT OF THE CASE

This case involves claims by hundreds of former Continental pilots and flight attendants for contract rejection damages pursuant to §§ 365 and 502 of the Bankruptcy Code. The claims arise from Continental's September 24, 1983, bankruptcy in which it rejected its pre-existing collective bargaining agreements and imposed in their place "emergency work rules" that reduced wages and benefits by more than half. Rather than accepting Continental's unilateral and drastic changes in their wages and working conditions, the pilots and flight attendants embarked on a lawful strike. This petition asks this Court to consider (1) whether exercising their lawful right to strike divested these

employees of their statutory claim for damages, and (2) whether contract rejection damages should be limited by a hypothetical shutdown date.

A. The ALPA and UFA Labor Contracts.

For many years prior to September 24, 1983, Continental employed pilots and flight attendants under terms and conditions contained in labor contracts which it negotiated with the Air Line Pilots Association ("ALPA") and with the Union of Flight Attendants ("UFA"). The ALPA contract in force at the time of Continental's 1983 bankruptcy was dated August 18, 1982. In it, the pilots gave Continental about $100 million in wage and benefit concessions from their prior contract based on Continental's representation that it needed the concessions to continue its operations.

B. Continental's 1983 Bankruptcy, the Rejection of the ALPA and UFA Contracts, and the Emergency Work Rules.

On September 24, 1983, Continental ceased domestic flight operations and filed a bankruptcy petition under Chapter 11. On September 27, 1983, Continental filed a motion in bankruptcy court to reject its labor contracts with ALPA and UFA pursuant to 11 U.S.C. § 365. On that same day, just thirteen months after the pilots had given the company $100 million in wage and benefit concessions, Continental reopened its domestic flight operations under drastically changed terms and conditions known as "Emergency Work Rules." The Emergency Work Rules cut employee

wages by more than half and increased their work hours.[1] Continental did not negotiate with ALPA or the UFA over the Emergency Work Rules, but required pilots and flight attendants to work under them as a condition of continued employment.

C. The ALPA and UFA Strikes.

In response to the Emergency Work Rules, ALPA and UFA commenced lawful economic strikes on October 1, 1983. All of the petitioners honored and participated in their respective unions' strikes.

The UFA strike continued until April 17, 1985. On that date, the UFA made an unconditional offer to return to work on behalf of its striking members without reaching a strike settlement agreement. The ALPA strike continued until October 31, 1985, when the bankruptcy court entered an "Order and Award" containing the terms of a secret strike settlement reached between Continental and ALPA and presented to the bankruptcy court for entry as a court order.[2] On November 17, 1985, the court amended the Order and Award to reflect subsequent changes

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[1] For example, Continental cut the average captain's salary from $90,000 to $43,00 per year, the average first officer's salary from $64,000 to $31,510 per year, and the average second officer's salary from $45,000 to $26,510 per year. In an opinion rendered in connection with a striking pilot's application for dislocated workers' benefits under the Airline Deregulation Act of 1978, 49 U.S.C. §§ 1301 *et seq.*, the Department of Labor concluded that these drastic changes constituted a "constructive furlough or termination" of the affected employee.

[2] This Court already has reviewed the Continental strike and its settlement in *Air Line Pilots Ass'n v. O'Neill*, 111 S. Ct. 1127 (1991). Subsequent to Continental's first bankruptcy, and in part because of it, Congress amended the Bankruptcy Code to require at least a minimum of bargaining before employers could reject their labor contracts. *See* 11 U.S.C. § 1113. This amendment leaves intact the employer's ultimate right to reject its labor contracts and the statutory damages remedy at issue here.

negotiated by Continental and ALPA. Continental has not to date negotiated a new labor contract with either ALPA or the UFA.

D. The Present Litigation.

1. The bankruptcy court's dismissal of the pilots' and flight attendants' contract rejection claims on summary judgment.

The bankruptcy court approved Continental's rejection of the ALPA and UFA contracts on June 19, 1984 and December 5, 1984, respectively. The bankruptcy court's rejection orders stated that the contracts were rejected effective September 24, 1983, the date of the bankruptcy filing. ALPA, on behalf of its pilot members, and the UFA, on behalf of its flight attendant members, filed proofs of claim for contract rejection damages under 11 U.S.C. §§ 365(g) and 502(g).

Continental next filed a motion for partial summary judgment on April 30, 1985, asking the bankruptcy court to disallow the contract rejection claims of pilots and flight attendants for the time they were on strike. The bankruptcy court granted Continental's motion on September 10, 1985 for the following reason:

> Under well-established principles of federal labor law, striking employees are not entitled to back pay for the period they were on strike, even if the strike is a response to an unlawful unfair labor practice by the employer.

Because the unions had objected to the bankruptcy court's jurisdiction under 28 U.S.C. § 157(d) to interpret and apply federal labor law, the bankruptcy court alternatively estimated the value

of such claims as zero under 11 U.S.C. § 502(c) on the same grounds.

On September 20, 1985, Continental filed an additional motion for summary judgment in the bankruptcy court seeking to disallow the remaining pilot and flight attendant claims for contract rejection damages, including claims for time not on strike. On May 8, 1986, the court granted the motion as to the flight attendants and, on June 26, 1986, granted the motion as to the pilots. The following grounds were stated for both rulings:

> [B]ut for the Court's rejection of the collective bargaining agreements at issue here, [Continental] would have gone out of business and [the employees] could not have claimed lost future wages as damages, because the agreements did not guarantee future employment.

Because of the unions' jurisdictional objections, the bankruptcy court again alternatively estimated the claims at zero under 11 U.S.C. § 502(c). Finally, although unnecessary to its holding, the court also ruled that any employee claims for contract rejection damages would be cut off as of the amendable dates of their labor contracts and that the damages would be limited to one year's compensation under 11 U.S.C. § 502(b)(7).

2. The O'Neill Group intervention and appeals.

When the bankruptcy court dismissed the pilots' remaining contract rejection claims on June 26, 1986, it also held that proofs of claim filed by ALPA and the UFA on behalf of their members were improper, and permitted union members to intervene and pursue their contract rejection damage claims as individuals. The O'Neill Group previously intervened and filed a notice of appeal

from the June 26, 1986 summary judgment ruling. By that time, the UFA had appealed the bankruptcy court's May 8, summary judgment ruling against the flight attendants. Most of the flight attendants in the O'Neill Group therefore intervened in the UFA appeal.

The district court consolidated these appeals and scheduled oral argument on the consolidated appeals (and several other bankruptcy court appeals) for February 27, 1989. On that date, the district court announced in open court, without oral argument, that it would affirm the bankruptcy court's summary judgment rulings, and entered an order to that effect on March 13, 1989.

The Fifth Circuit (Garwood, J. dissenting), upheld the bankruptcy court's ruling that contract rejection damages were not available to the petitioners for the time they were on strike. Analogizing to back pay cases under labor law, the court reasoned that "[a]bsent constructive dismissal by the employer," the employees would not be entitled to back pay for the period of time they were on strike (App. A at 13A). The Fifth Circuit never determined whether there was a constructive dismissal by virtue of Continental's imposition of the emergency work rules, erroneously assuming that this question had been decided in a separate bankruptcy proceeding. Judge Garwood dissented, and pointed out that whether or not the employees were on strike, they still should be entitled to recover the difference between what they would have made under the rejected labor contracts and what Continental actually paid. He wrote that to deny employees all damages for the strike period "simply awards Continental a windfall" (App. A at 17A).

The Fifth Circuit also upheld the bankruptcy court's ruling that lost future wages were not recoverable where the debtor would have gone out of business absent the contract rejection. On this point, however, the Fifth Circuit remanded, holding that the pilots and flight attendants were entitled to contract rejection damages for the period Continental would have been able to continue operations under its labor contracts.[3]

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit Opinion Creates An Unnecessary Conflict Between The Right To Strike Guaranteed Under The Railway Labor Act And The Right To Contract Rejection Damages Guaranteed Under The Bankruptcy Code.

We deal with a great national problem. Bankruptcy has become an accepted business practice in modern America. In 1989 and 1990 alone, there were 38,348 Chapter 11 bankruptcy petitions filed, involving such corporate giants as Federated Department Stores and Southland Corporation. New Generation Research, Inc., THE 1991 BANKRUPTCY YEARBOOK & ALMANAC 6, 32 (1st ed. 1991). The use of bankruptcy is especially common in the transportation industry where Continental Airlines, Greyhound Lines, Eastern Air Lines, and Braniff, to name but a few, have all sought protection under Chapter 11. *Id.* at 32-33.

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[3] The Fifth Circuit also held that it was only harmless error when the bankruptcy court judge accepted an offer of employment from the law firm representing Continental shortly after approving an award of $700,000 in legal fees to the firm.

Under Section 365 of the Bankruptcy Code, employers in bankruptcy are permitted to reject their collective bargaining agreements and set new terms and conditions of employment. 11 U.S.C. § 365; *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531 (1984). When so rejected, the agreement is deemed breached the day before the Chapter 11 petition was filed, 11 U.S.C. § 365(g), and the employees' claims for damages are treated as unsecured pre-petition claims. *See NLRB v. Bildisco & Bildisco*, 465 U.S. at 530 n.12. Numerous employers who have filed for bankruptcy have used these provisions to finance their recoveries by cutting labor costs. *See, e.g., In re Mile Hi Metal Systems*, 899 F.2d 887 (10th Cir. 1990); *In re Landmark Hotel & Casino, Inc.*, 872 F.2d 857 (9th Cir. 1989); and *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers*, 791 F.2d 1074 (3d Cir. 1986).

The employees' right to contract rejection damages is the *quid pro quo* for the employer's ability in bankruptcy to reject its labor contracts. The right to damages vests at the time the labor contract is rejected. Nothing in the Bankruptcy Code states or even suggests that the right to contract rejection damages is lost for any period during which employees subsequently exercise their lawful right to strike. Time and again, this Court has emphasized that the right to strike "is integral to the [Railway Labor] Act." *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 385-86 (1969). By misinterpreting the Bankruptcy Code, the Fifth Circuit punished these employees and held that they were compelled to continue working at whatever wages Continental chose to pay them and under any conditions that Continental chose to impose if they wanted to keep their damages claims under the Bankruptcy Code (App. A, pp. 13A-16A). On this important point, the Fifth Circuit has unnecessarily and unwisely created a conflict between the right to contract rejection damages and the right to strike. The result is a "windfall" for Continental and Judge Garwood rightly dissented.

A. The Fifth Circuit's Decision Creates a New Class of Indentured Servant — The § 502(g) Employee-Creditor.

Under § 502(g) of the Bankruptcy Code, an unsecured claim for damages is the exclusive remedy available for a debtor's breach of a labor contract, replacing the labor law remedies otherwise available outside of the bankruptcy.[4] 11 U.S.C. § 502(g). In *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), this Court observed:

> claims arising after filing, such as result from the rejection of an executory contract, must also be presented through the normal administration process by which claims are estimated and classified. *See* 11 U.S.C. § 502(g); *In re Hoe & Co., Inc.*, 508 F.2d 1126, 1132 (2d Cir. 1974); *Workman v. Harrison*, 282 F.2d 693, 699 (10th Cir. 1960). Thus, suit cannot be brought against the debtor in possession under the collective bargaining agreement; recovery may be had only through administration of the claim in bankruptcy.

465 U.S. at 530.

If upheld, the ruling below will permit employers to hold this unsecured interest hostage, forcing employees to choose between working at whatever wage the employer imposes or withdrawing their services and losing their sole remedy for their employer's

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[4] Under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, employees can obtain an injunction requiring the employer to abide by its labor contract, back pay for the time the employer did not follow the contract, and any other relief necessary to place them in the same position they would have been in but for the employer's unlawful conduct. *Mungin v. Florida East Coast Ry.*, 416 F.2d 1169 (5th Cir. 1969).

breach of the labor contract. There is no support in the bankruptcy law for such an inequitable result.

First, the courts have uniformly held that rejection of an employment contract may result in both rejection damages and a strike. In *Int'l Brotherhood of Teamsters v. IML Freight, Inc.*, 789 F.2d 1460 (10th Cir. 1986), for example, the Tenth Circuit reversed the rejection of a collective bargaining agreement because, even though the employees were on strike, "both the bankruptcy judge and the district court failed to recognize that the rejections could generate burdensome claims against the estate." *Id.* at 1463. Thus, despite the strike, the court held that "claims may be filed for all losses attributable to the non-performance of the contracts, including payments due to all fringe benefit plans, loss of seniority rights, and all other provisions of the agreements." *Id.* The unavoidable conclusion from *IML Freight* is that a strike does not alleviate the debtor's liability for rejection claims.[5]

Second, the Code contains nothing that limits the ability of employees to participate in lawful strikes, the most effective economic weapon allowed by the labor laws. The result of the Fifth Circuit's decision is to allow debtors to use the bankruptcy process to subvert employees' labor law rights by effectively requiring them to forfeit accrued rejection claims if they strike. This is contrary to a substantial body of case law holding that the right to strike remains intact despite a bankruptcy. *See Briggs Transp.*

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[5] *See also In re Bildisco*, 682 F.2d 72, 80 (3d Cir. 1982) (in balancing equities to determine whether contract rejection should be allowed, bankruptcy court must consider the likelihood of both a strike and large damage claims), *aff'd*, 465 U.S. 513 (1984); *In re Salt Creek Freightways*, 47 B.R. 835 (Bankr. D. Wyo. 1985) (estimation of contract rejection damages required even though employees struck after court-approved rejection).

Co. v. Int'l Brotherhood of Teamsters, 739 F.2d 341 (8th Cir.) (bankruptcy court lacked jurisdiction to enjoin a strike or picketing), *cert. denied*, 469 U.S. 917 (1984); *Matter of Brada Miller Freight Sys., Inc.*, 702 F.2d 890, 899 (11th Cir. 1983) ("the impact of a potential strike on the debtor need also enter into the court's calculus"); *Truck Drivers Local 807 v. Bohack Corp.*, 541 F.2d 312, 318 (2d Cir. 1976) ("By filing under Chapter 11 an employer does not become clothed in immunity from union action.").

B. The Fifth Circuit's Decision Encourages the Massive Defeat of Employees' Rights Under the Bankruptcy and Labor Laws.

The Fifth Circuit decision, which is based on a serious misinterpretation of the Bankruptcy Code, deprives more than 450 Continental employees of their sole remedy for Continental's breach of its labor contracts. While the magnitude of the harm in this case alone is sufficient to warrant certiorari review, it is clear that the situation of the pilots and flight attendants is not unique. The rejection of labor contracts by debtors seeking to pay workers less or avoid fixed damage claims for layoffs is a familiar occurrence. *See In re Royal Composing Room*, 848 F.2d 345 (2d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989); *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers*, 791 F.2d 1074 (3d Cir. 1986); *In re Texas Sheet Metals, Inc.*, 90 B.R. 260 (Bankr. S.D. Tex. 1988); *In re U.S. Truck*, 89 B.R. 618 (E.D. Mich. 1988); *Matter of Walway Co.*, 69 B.R. 967 (Bankr. E.D. Mich. 1987). If allowed to stand, this result will invite employers to continue to reject labor contracts and replace them with extremely harsh terms so as to encourage a strike and avoid liability for rejection damages. *See* App. A at 17A (Garwood, J. dissenting) (describing this aspect of majority's opinion as a "windfall" for debtor).

C. The Fifth Circuit's Decision, by Seriously Misinterpreting the Applicable Law, Cuts Off Petitioners' Only Available Remedy for Continental's Breach.

The Fifth Circuit's opinion means that a pilot like Joseph O'-Neill who, after twenty years with the airline, had his contract unilaterally rejected and his salary cut in half, is limited to contract rejection damages amounting to seven days' pay. The Fifth Circuit's holding is unsupported by bankruptcy law. Indeed, the Code expressly contemplates that contract rejection damages are recoverable even though "the employer directed the employee to terminate, or such employee terminated, performance under such contract." 11 U.S.C. § 502(b)(7)(A)(ii). *See Union Bank v. Wolas*, 112 S. Ct. 527 (1991) (where law is clear, a heavy burden exists to show Congress intended otherwise); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989).

The Fifth Circuit's reliance on unfair labor practice back pay cases to support its opinion is misplaced. The damages at issue here are not statutory damages flowing from an unfair labor practice, but rather those flowing from Continental's court-approved breach of its labor contract. Thus, the proper principles to apply are those of contract law, not the NLRB's rulings regarding statutory back pay. This basic point was correctly raised in Judge Garwood's dissent, App. A at 17A.[6]

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[6] When the debtor is allowed by the court to breach a labor contract by paying reduced wages and benefits, employees are under a duty to mitigate their damages by seeking other employment or continuing to work for the reduced wages and benefits. Even assuming that the employees who went on strike failed to mitigate their damages, such failure does not eliminate Continental's responsibility for its contract breach; at most, the failure of the pilots and flight attendants to mitigate reduces their claims by the amount Continental actually

(continued)

Even if the back pay cases applied, however, Continental's changes were so severe and pervasive that they constituted constructive discharge and justified back pay. *See NLRB v. Haberman Constr. Co.*, 618 F.2d 288, 296 (5th Cir. 1980) (unilateral change contrary to collective bargaining agreement is constructive discharge), *aff'd in relevant part en banc*, 641 F.2d 351, 358-60 (5th Cir. 1981).[7] The damages remedy for constructive discharge is lost wages and benefits for the period of a strike, plus other equitable relief not available here because of Continental's bankruptcy.[8]

II. The Fifth Circuit's Decision Limiting Contract Rejection Damages Misapplies Fundamental Principles Of Law On Important Matters Going To The Heart Of The Bankruptcy System.

When a debtor (read "employer") rejects an executory contract, the rejection is treated as a pre-petition breach. 11 U.S.C.

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[6] *(continued)*
paid its working pilots. As stated by Judge Garwood, "there is no justification for denying them recovery for the difference between the revised work rule pay rates (and benefits) and those of the labor contracts; to do so simply awards Continental a windfall." App. A at 17A.

[7] The Panel avoided treating Continental's institution of its "Emergency Work Rules" as a constructive discharge by misconstruing *In re Continental Airlines Corp.*, 57 B.R. 845 (Bankr. S.D. Tex. 1985). The issue in that decision, however, was whether Continental's rejection was a "wrongful discharge" under state law, not whether it was a "constructive" discharge. The court concluded that the state law claim was preempted by the rejection remedy under the Code, and reserved the issue for decision in connection with the pilots' and flight attendants' pending contract rejection claims. The Department of Labor subsequently held that Continental's actions in this matter constituted a "constructive furlough or termination."

[8] *See Florida East Coast Ry. Co. v. Brotherhood of Locomotive Engineers*, 362 F.2d 482 (5th Cir. 1966); *Int'l Brotherhood of Elec. Workers v. A-1 Elec. Service*, 535 F.2d 1 (10th Cir.), *cert. denied*, 429 U.S. 832 (1976); *Film Projects, Inc.*, 231 N.L.R.B. No. 146 (1977).

§§ 365(g), 365(g)(1). To compensate for the rejection, the creditors (read "employee") receives an unsecured claim against the estate for the contract damages flowing from the breach. 11 U.S.C. § 502(g); 3 COLLIER ON BANKRUPTCY ¶ 502.07 (15th ed. 1992). In short, the Bankruptcy Code:

> gives entities injured by the rejection of an executory contract . . . a pre-petition claim for any resulting damages, and requires that the injured entity be treated as a pre-petition creditor with respect to that claim.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 354 (1977); S. Rep. No. 989, 95th Cong., 1st Sess. 65 (1978).

Purporting to apply this statutory scheme, the Fifth Circuit determined that the pilots and flight attendants here could not recover the bulk of the damages flowing from Continental's breach of its labor contracts with them because the agreements did not guarantee future employment:[9]

> The collective bargaining agreement in the present case provides no guarantees of continued employment. Hence, even if the present agreement had not been cancelled, damages would only be available for the time Continental would have been able to continue in business. . . .

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[9] In connection with this ruling, the Fifth Circuit remanded the case for a finding of when Continental would have ceased operations, stating that contract rejection damages were available up to that point. This limited relief is largely illusory, however, since the court also held that damages were not available for the time pilots and flight attendants were lawfully on strike, which covers all but one week of the period Continental would have remained in operation. *See* § I, *supra*.

(App. A at 12A). Stated differently, the court's analysis is: (1) Continental would have eventually ceased operating had it not rejected its labor contracts; (2) if this happened, the pilots would not have jobs; and (3) without guaranteed jobs, no damages could accrue.

A. Limiting Damages Based on Speculation of a Shutdown Contravenes Basic Bankruptcy Law.

The Fifth Circuit opinion allows bankrupt employers who breach their labor contracts to limit their employees' claims for damages by saying that it was only the breach of contract that allowed them to remain in business.[10] Not surprisingly, the decision below is the only authority for this proposition.

1. The decision violates Bankruptcy Code requirements for treating all creditors equally.

No bankruptcy authority supports the Fifth Circuit's decision to limit damages to "the time Continental would have been able to continue in business." App. A at 12A. The Bankruptcy Code does not authorize, as part of the calculation of contract rejection damages, a court to consider what would have happened without the rejection or which of the debtor's obligations caused the insolvency. Nor does the Code permit a court to disallow damages for contracts that otherwise would have caused the debtor to cease operations.

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[10] As noted by one commentator: "If the same logic were followed in awarding damages for the repair of a fender crumpled in an intersection collision, the plaintiff would be denied full recovery for the fender because it might have been damaged in some other way sooner or later." W. Holloway & M. Leech, *Employment Termination Rights and Remedies* at 402 (1985).

Not only is the Fifth Circuit's decision unsupported by bankruptcy law, it directly violates the fundamental tenet that all creditors be treated equally. *Young v. Higbee Co.*, 324 U.S. 204, 210 (1945). By limiting the employees' damages to the time Continental hypothetically could have continued operations, the Fifth Circuit violated this principle in treating the employees, *qua* unsecured creditors, differently from and worse than other unsecured creditors of Continental.

Specifically, Continental elected to reject its contracts with the pilots and flight attendants and to continue operations. With the exception of its employees, Continental paid all of its unsecured creditors in full, even those whose contracts it rejected. Only the pilots and flight attendants were not paid, even though the Fifth Circuit's imaginary demise of the airline should have affected all unsecured creditors equally by cutting off payments to both employees and nonemployees. In short, the Fifth Circuit allowed Continental to use the unsecured interests of its pilots and flight attendants to fly itself out of bankruptcy and pay off its other creditors.

2. The ruling contradicts this Court's decision in *NLRB v. Bildisco & Bildisco*.

In *Bildisco*, this Court held that contract rejection damages are considered unsecured claims against the bankruptcy estate. As to what items of damage were recoverable, this Court stated:

> Section 502(c) provides that any contingent or unliquidated claim shall be estimated for purposes of settling a bankrupt estate. Under this provision losses occasioned by the rejection of a collective-bargaining agreement must be

> estimated, including unliquidated losses attributable to fringe benefits or security provisions like seniority rights. . . .

465 U.S. at 530 n.12.

The limitation on future wages as contract rejection damages in this case cannot be reconciled with *Bildisco*.[11] There is no logical distinction between future fringe benefits and lost wages; both arise only if the debtor continues to employ its workers. *Accord In re U.S. Truck Co.*, 89 B.R. 618, 624 (E.D. Mich. 1988) (rejecting same debtor argument and holding "the logic in *Bildisco* extends to lost future wages"). Unlike the court below, the *Bildisco* Court

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[11] The Fifth Circuit attempted to distinguish *Bildisco* by saying that it merely attempted to clarify § 502(c), "which requires the estimation of unliquidated claims *if such are otherwise recoverable*." App. A at 11A (emphasis in original). First, nowhere in its opinion did this Court imply that only "otherwise recoverable" claims are to be estimated.

Second, the pilots' and flight attendants' claims in this case are "otherwise recoverable." In the 1978 amendments to the Bankruptcy Code, Congress eliminated restrictions on the distribution of unliquidated or contingent claims such as those here. *See* 3 COLLIER ON BANKRUPTCY ¶ 502.03, at 502-72 (15th ed. 1992) (discussing former 11 U.S.C. § 57d). Under the Code as it now stands, a recoverable claim includes any

> right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . . .

11 U.S.C. § 101(5)(A). *See also Bildisco*, 465 U.S. at 530 n.12 (noting that Congress provided more protection to unsecured creditors, such as employees of a debtor, whose interests were overlooked and underestimated in the past with the 1978 Act). The Fifth Circuit's reliance on the possibility that Continental would have ceased operations returns bankruptcy law to its pre-1978 roots of disallowing disputed or contingent claims. The policy of the Code now is to allow these types of claims, and the possibility that the employer may cease operations is irrelevant.

did not impose any added condition that employees claiming rejection damages demonstrate a guarantee of continued employment.

B. The Fifth Circuit's Decision Establishes a Measure of Contract Rejection Damages Under § 502 That Is At Odds With Basic Contract Law Principles.

As noted, an executory contract rejected under § 365 is treated as a pre-petition breach which allows the nondebtor to recover conventional contract damages. Section 502(b)(1) of the Bankruptcy Code requires that the value of a § 365 breach is determined in precisely the same way that such a claim would be if a bankruptcy had not occurred. In limiting damages to the time it thought Continental would have remained in business, the Fifth Circuit abandoned the directive of § 502(b)(1) and contradicted well-established case law on contract damages.

Accepting the Fifth Circuit's premise that the labor contracts here did not guarantee employment, then the contracts are, by the lower court's account, simple requirements contracts. The buyer (Continental) agreed to fill its requirements for a particular product (labor) over a specified period of time from a seller (ALPA and the UFA), who agreed to make the product available at a specified price (the terms of the labor contracts). It is beyond dispute that a buyer subject to a requirements contract who meets continuing needs by purchasing the product elsewhere is liable to the seller for breach of contract, and that damages are the amount

of the product the buyer acquired elsewhere, multiplied by the contract price, less any mitigation.[12]

These principles apply here. Continental continued to require pilots and flight attendants after the filing of its bankruptcy petition, but obtained these services at prices below the terms of its rejected labor contracts. Like any other requirements supplier, the pilots' and flight attendants' damages must be based on the original contract terms and the requirements Continental subsequently had, not speculation that Continental would have no needs at all.

This is the result reached in the only other reported decision addressing the measure of damages for rejection of a labor contract. *In re U.S. Truck Co., Inc.*, 89 B.R. 618 (E.D. Mich. 1988), *aff'g* 74 B.R. 515 (Bankr. E.D. Mich. 1987). There, both the district court and the bankruptcy court measured damages based on the fact that the debtor continued to employ workers after rejecting its labor contract with them, rather than on a hypothetical decision to go out of business, and expressly rejected the bankruptcy court holding affirmed by the Fifth Circuit below. The district court properly analyzed this issue as follows:

> If U.S. Truck had ceased operations and liquidated, the [employees] would have had no claim against it for future lost wages . . . .

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[12] *See Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1362 (10th Cir. 1989); *Universal Power Sys. v. Godfather's Pizza*, 818 F.2d 667, 673 (8th Cir. 1987); *Center Chemical Co. v. Avril, Inc.*, 392 F.2d 289 (5th Cir. 1968); *Globemaster, Inc. v. Magic American Chemical Corp.*, 386 F.2d 420 (6th Cir. 1967); *Locke v. United States*, 283 F.2d 521 (Ct. Cl. 1960); *Texas Industries v. Brown*, 218 F.2d 510 (5th Cir. 1955); *Haveg Corp. v. Guyer*, 226 A.2d 231 (Del. 1967).

> [However,] U.S. Truck and its trustee determined that the interests of the creditors and the debtor were best served by continued economic activity. Therefore, a decision was made that employment should continue during the period of time that the claimed damages accumulated. This situation of continuing employment has no relation to a context where no employment was available during specific parts of a company's annual business cycle. In fact, to the extent the court should look to the actual operations of the company to determine what damage award is appropriate, the continued employment of part of U.S. Truck's workforce militates in favor of finding damages for pay lost through the 10-percent reduction in wages. . . .
>
> [T]he court cannot say what would have happened had the company decided to liquidate. A buyer might have been found; for example, who would have continued the operations of U.S. Truck. Rather than speculate as to what might have occurred, the court believes it is the better course to look at the actual events. Because U.S. Truck continued to employ workers, these workers should be an unsecured creditor for the difference between what they were paid and the amounts contemplated by the Agreement.

89 B.R. at 625-26. *See also Local 461 v. Singer Co.*, 540 F. Supp. 442, 450 (D.N.J. 1982). By failing to distinguish or reconcile *U.S. Truck*, the Fifth Circuit's decision creates great uncertainty in this area of the law.

The Fifth Circuit's opinion places the entire burden of Continental's bankruptcy on one discrete group of creditors — the employees — and, in doing so, ignores the fundamental con-

tract law principle that speculation about what "might have been" cannot support or limit an award of damages.

CONCLUSION

The decision below conflicts with basic bankruptcy and labor law. The Fifth Circuit's view of the Bankruptcy Code as it applies to the determination of contract rejection damages is not only seriously in error, but is fundamentally harsh and unjust. In light of the central role of labor contracts in the economic arena, and the increasing use of the bankruptcy laws by employers, the public importance of this question is so great that this petition should be granted.

RESPECTFULLY SUBMITTED, June 1992.

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APPENDIX A

APPENDIX A

In re CONTINENTAL AIRLINES CORP., et al., Debtors.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and James C. Stephens, et al., Appellants,

v.

CONTINENTAL AIRLINES, INC., et al., Appellees.

O'NEILL GROUP, Appellants,

v.

CONTINENTAL AIRLINES, INC., et al., Appellees.

UNION OF FLIGHT ATTENDANTS, Appellant,

v.

CONTINENTAL AIRLINES, INC., et al., Appellees.

No. 89-2347.

United States Court of Appeals, Fifth Circuit.

May 25,1990.

Randolph J. Haines, Marty Harper, Allen Clarke, Jessica Franken, Lewis & Roca, Phoenix, Ariz., for appellants.

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James R. O'Donnell, Leon V. Komkov, Butler & Binion, Houston, Tex., for Stephens Group.

Barbara Gardner, Mandell & Wright, Houston, Tex., Bruce Simon, Babette Ceccotti, Cohen, Weiss, & Simon, New York City, Kathleen M. Schaden, Schaden, Heldman & Lampert, Denver, Colo., Christopher Cameron, Taylor, Roth, Bush & Geffner, Burbank, Cal., Daniel P. Casey, Continental Airlines, Inc., Houston, Tex., for appellees.

John J. Gallagher, Charles L. Warren, Jon A. Geier, Aiken, Gump, Strauss, Hauer & Feld, Washington, D.C., Lenard Parkins, Sheinfeld, Maley & Kay, Houston, Tex., for Continental Airlines, Inc.

Appeals from the United States District Court for the Southern District of Texas.

Before GEE, REAVLEY, and GARWOOD, Circuit Judges.

GEE, Circuit Judge:

Today's case presents the question whether employees whose collective bargaining agreements are rejected in a Chapter 11 bankruptcy are entitled to future wages and benefits as contract rejection damages under 11 U.S.C. § 502(g). Recognizing that the agreements here at issue do not guarantee employment, we hold that the difference between the wages and benefits set out in the agreements and the wages and benefits actually paid under the emergency work rules are recoverable as unsecured claims to the extent that work would have been available had the agreements not been rejected. The bankruptcy court dismissed all employee claims without considering how long Continental could have

remained in business absent rejection of the agreements. For this and other reasons to be stated, we reverse and remand the cause to the bankruptcy court to allow it to make a specific finding of when Continental would have had to cease operations had it not cancelled its labor contracts, and to calculate appropriate damages to that date.

I. *Facts*

In 1983, Continental halted domestic flight operations and filed a bankruptcy petition under Chapter 11. Continental then filed a motion in bankruptcy court to reject its labor contracts with the Air Line Pilots Association, International ("ALPA") and the Union of Flight Attendants ("UFA") pursuant to 11 U.S.C. Section 365. That same day, Continental recommenced its domestic flights under what it termed "Emergency Work Rules," rules that changed dramatically the employees' terms and conditions of employment. As a result, ALPA and UFA called strikes.

The bankruptcy court approved Continental's rejection of its labor contracts with ALPA and UFA and ordered the rejection effective the date of the bankruptcy filing. ALPA and UFA then filed proofs of claim, in amounts of $408 million and $409 million respectively, for contract rejection damages under 11 U.S.C. Sections 365(g) and 502(g). These claimed damages consisted of the full wages and benefits set forth in the rejected labor contracts, for time periods beginning from the date of the bankruptcy filing up to and somewhat beyond the contracts' amendable dates.

In October of 1985, Bankruptcy Judge T. Glover Roberts, acting by agreement between Continental and ALPA, signed an "Order and Award" that was intended to settle all issues between Continental and ALPA, including the contract rejection damage

claims. Because of objections raised by certain individual pilots, the court allowed pilots who did not participate in the settlement to file proofs of claim and pursue their derivative share of the claims originally filed by ALPA. A like settlement agreement was reached between Continental and UFA, with a procedure created which was similar to that for the pilots, allowing non-settling flight attendants to pursue their claims independently of UFA. In all, approximately 460 pilots and 14 flight attendants have filed proofs of claim seeking contract rejection damages under the procedures established by the bankruptcy court.

In a motion for partial summary judgment, Continental next asked the bankruptcy court to disallow contract rejection damages claims for the time that the employees were on strike. When that motion was granted on September 10, 1985 ("September 10 Order"), Continental filed an additional motion for summary judgment seeking to disallow the remaining claims for contract rejection damages. This was granted as to the claims of the flight attendants on May 8, 1986 ("May 8 Order"), and as to the pilots' claims on June 26 of the same year ("June 26 Order"). The court reasoned that as the collective bargaining agreements did not guarantee employment, the claimants were not entitled to future wages and benefits as contract rejection damages. The orders were appealed to federal district court, which affirmed them.

II. *Discussion*

A. Failure to Stand Recused

The appellants contend that Judge Roberts, who shortly after making his May 8 and June 26 orders received and accepted an offer for partnership in the law firm representing Continental,

should have stood recused from the case and that his failure to do so requires the reversal of those orders.

Several months before making his rulings in this case, Judge Roberts had announced his intentions to enter private practice and to stop handling the Continental bankruptcy cases to avoid conflicts of interest in the event he considered employment with any of the firms appearing before him. Shortly thereafter, Continental's local bankruptcy counsel, Messrs. Sheinfeld, Maley & Kay ("Sheinfeld"), discussed hiring Judge Roberts at a partnership meeting. Before his confirmation of Continental's plan of reorganization, at least two Sheinfeld lawyers had asked Judge Roberts about his future employment plans. At about the same time, Judge Roberts was quoted as praising Continental's President Frank Lorenzo in articles which appeared in Business Week and the Wall Street Journal.[1]

Judge Roberts granted summary judgment disallowing all contract rejection damage claims in orders made on May 8 and June 26,1986, and confirmed Continental's plan of reorganization on June 30. On July 1, Judge Roberts granted various fee requests made by counsel, including a $700,000 fee to Sheinfeld. On July 2, Sheinfeld contacted Judge Roberts about joining their partnership. On July 29, Judge Roberts agreed to join the firm and did so on September 5 of the same year.

28 U.S.C. Section 455(a) requires a judge to stand recused "in any proceeding in which his impartiality might reasonably be

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[1] Judge Roberts was reported to have said concerning Frank Lorenzo: "'Who do you know with the guts to put half a billion dollars on the table and say he can do a turnaround' of a company that is a prime candidate for bankruptcy.... If anybody can do it, Lorenzo can." *Frank Lorenzo, High Flier*, Business Week, March 10, 1986 at 104, 107.

questioned." Because the goal of Section 455(a) "is to exact the appearance of impartiality," recusal may be mandated even though no *actual* partiality exists. *Hall v. Small Business Admin.*, 695 F.2d 175, 178 (5th Cir. 1983). The standard for recusal is an objective one, that if a "reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality." *Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 800 (5th Cir. 1986), *aff'd*, 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988).

In the present case there is no allegation that, prior to his rulings in this case, Judge Roberts had sought employment with the Sheinfeld firm, or that he knew that the firm was actively considering him. The close coupling of Judge Roberts's rulings with the employment offer and his acceptance of it, however, does create the appearance that he may have been pursuing employment with Sheinfeld while he was presiding over the case. As the Seventh Circuit noted in *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 461 (7th Cir. 1985):

> The appearance of equal justice requires that the judge not be exploring the prospects of employment with one lawyer or all lawyers appearing in a case before him. The dignity and independence of the judiciary are diminished when the judge comes before the lawyers in the case in the role of a suppliant for employment. The public cannot be confident that a case tried under such conditions will be decided in accordance with the highest traditions of the judiciary.

Id. at 461.

Continental contends that a judge cannot be expected to stand recused in a case when he is unaware that counsel for one of the

parties appearing before him is considering him for employment. The Supreme Court, in *Liljeberg v. Health Services Corp.*, responded to a similar contention:

> Contrary to petitioner's contentions, this reading of the statute does not call upon judges to perform the impossible — to disqualify themselves based on facts they do not know. If, as petitioner argues, § 455(a) should only be applied prospectively, then requiring disqualification based on facts the judge does not know would of course be absurd; a judge could never be expected to disqualify himself based on some fact he does not know, even though the fact is one that perhaps he should know or one that people might reasonably suspect that he does know. But to the extent the provision can also, in proper cases be applied retroactively, the judge is not called upon to perform an impossible feat. Rather, he is called upon to rectify an oversight and to take the steps necessary to maintain public confidence in the impartiality of the judiciary. If he concludes that "his impartiality might reasonably be questioned," then he should also find that the statute has been violated. This is certainly not an impossible task.

486 U.S. 847, 861, 108 S. Ct. 2194, 2202-03, 100 L. Ed. 2d 855, 873 (1988). Similarly, to hold that § 455(a) was violated in the present case does not mean that Judge Roberts was required to stand recused before discovering that he was being considered for employment. Rather, when an offer of employment was received the day after his approval of $700,000 in legal fees to the firm making the offer, Judge Roberts was "required to take the steps necessary to maintain public confidence in the judiciary." In the circumstances of this case Judge Roberts should either have rejected the offer outright, or, if he seriously desired to consider

accepting the offer, stood recused and vacated the rulings made shortly before the offer was made. Although we are confident that Judge Roberts committed no substantive impropriety in his handling of the motions in this case, we nevertheless conclude that recusal was mandated by the appearances of the situation which we have described.

Although a violation of § 455(a) has occurred in the present case, reversal is not automatic. As with other areas of the law, the "harmless error" rule applies to a breach of a judge's duty to stand recused under § 455(a). *Liljeberg*, 486 U.S. at 861-62, 108 S. Ct. at 2202-03, 100 L. Ed. 2d at 873-74. In determining whether reversal is mandated by a failure to stand recused, a number of factors warrant our careful consideration: The risk of injustice to the parties in this particular case; the risk that the denial of relief will produce injustice in other cases; the risk of undermining the public's confidence in the judicial process. *Id.* at 864, 108 S. Ct. at 2204, 100 L. Ed. 2d at 875.

The risk of injustice to the parties in allowing a summary judgment ruling to stand is usually slight. Such rulings are subject to de novo review, with the reviewing court utilizing criteria identical to that used by the court below. In cases where we would otherwise affirm such a ruling, little would be gained by vacating and remanding with instructions that it be essentially reinstated.[2]

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[2] The Eleventh Circuit noted in a similar situation:

> As discussed previously, we agree with the district court that summary judgment was proper. It would, therefore, be ridiculous to remand this case and reassign it to another judge after we have already exercised plenary review and have concluded that summary judgment was proper.

Parker v. Connors Steel Co., 855 F.2d 1510, 1526 (11th Cir. 1988), *cert. denied*, — U.S. —, 109 S. Ct. 2066, 104 L. Ed. 2d 631 (1989).

Next, we consider whether a failure to vacate the orders below would be likely to produce injustice in other cases. We seriously doubt that a failure to vacate the decisions of the bankruptcy court could be read in future cases as a nod of approval for Judge Roberts's handling of the situation; rather, our ruling here should serve as a caution to other judges who are contemplating private employment following retirement. Moreover, were we to vacate the orders below for the § 455 violation alone, injustice to other Continental creditors might result from the delay in finishing Continental's plan of reorganization.

Finally, we consider whether the public's confidence in the judicial process will be undermined if we hold Judge Roberts's violation of Section 455(a) to be harmless error. We are aware of the high profile the Continental bankruptcy has had before the public and that the circumstances surrounding Judge Roberts's retirement from the bench have not gone unnoticed by the press.[3] That we have ruled Judge Roberts's actions to be violative of Section 455(a) should serve to restore some of any public confidence lost as a result of the violation; whether vacating the orders granting summary judgment for the sake of appearances alone would help or hinder the restorative process, however, is not clear. As the Eleventh Circuit has noted, in similar circumstances:

> In fact, if we reverse and vacate a decision that we have already determined to be proper, the public will lose faith in our system of justice because the case will be overturned without regard to the merits of the employees' claims. Judicial decisions based on such technical arguments not relevant to the merits contribute to the public's distrust in our system of justice.

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[3] *See* Texas Lawyer, Dec. 1-5, 1986, at 1; Wall St. J., Oct. 6, 1986, at 24, col. 1.

Parker v. Connors Steel Co., 855 F.2d 1510, 1527 (11th Cir. 1988), *cert. denied*, — U.S. —, 109 S. Ct. 2066, 104 L. Ed. 2d 631 (1989). We accordingly hold that the Section 455(a) violation in the present case constituted harmless error.

B. Contract Rejection Damages

Bankruptcy Code Section 365 permits an employer to reject a collective bargaining agreement and set new terms and conditions of employment. 11 U.S.C. § 365; *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531, 104 S. Ct. 1188, 1198-99, 79 L. Ed. 2d 482 (1984). When so rejected, the agreement is deemed breached the day before the Chapter 11 petition was filed. 11 U.S.C. § 365(g). Section 502(g) provides a remedy for this breach in lieu of the labor law remedies which would have been available outside bankruptcy. The appellants contend that, in addition to accrued wages and benefits, future wages and benefits are recoverable as of right as Section 502 contract rejection damages.

In support of their contention that the district court erred in rejecting their damage claims, the appellants rely principally upon *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 104 S. Ct. 1188, 79 L. Ed. 2d 482 (1983), in which the Supreme Court held that the authority of a debtor-in-possession to seek the rejection of a collective bargaining agreement was not subject to the modification restrictions of Section 8(d) of the NLRA. In a footnote the Court stated that the "losses occasioned by the rejection of a collective-bargaining agreement must be estimated, including unliquidated losses attributable to fringe benefits or security provisions like seniority rights." *Id.* at 530 n. 12, 104 S. Ct. at 1198 n. 12. The appellants read this portion of the opinion as mandating the award of contract rejection damages whenever a collective bargaining agreement is breached. The plaintiffs fail to recognize,

however, that this footnote was simply the Court's attempt at clarifying Section 502(c), which requires the estimation of unliquidated claims *if such are otherwise recoverable*. *Id.* at 530, 104 S. Ct. at 1198. Whether certain types of damages are recoverable under Section 502 will depend upon the particular contract at issue and the circumstances surrounding its rejection.

1. Collective bargaining agreements

Unlike a contract of employment, ordinarily a collective bargaining agreement does not create an employer-employee relationship; and its rejection does not terminate an employment relationship. It neither obligates any employee to perform work nor requires the employer to provide work. It is simply "a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law — the common law of a particular industry or of a particular plan." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550, 84 S. Ct. 909, 915, 11 L. Ed. 2d 898 (1964). As has been noted by the Supreme Court:

> [C]ollective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to the terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment.

J.I. Case Co. v. National Labor Relations Board, 321 U.S. 332, 335, 64 S. Ct. 576, 579, 88 L. Ed. 762 (1944). Unless a collective bargaining agreement guarantees future employment, lost future wages and benefits as damages for its breach are not recoverable in periods when no work would have been available. *See, e.g., NLRB v. Biscayne Television Corp.*, 337 F.2d 267, 268 (5th Cir. 1964); *Nabors v. NLRB*, 323 F.2d 686, 690 (5th Cir. 1963), *cert. denied*, 376 U.S. 911, 84 S. Ct. 666, 11 L. Ed. 2d 609 (1964); *NLRB v. Columbia Tribune Publishing Co.*, 495 F.2d 1384, 1393 (8th Cir. 1974).[4] Likewise, employees working under such an agreement are not entitled to lost future wages if the employer ceases operations. *See, e.g., J.I. Case, supra; Fraser v. Magic Chef — Food Giant Markets, Inc.*, 324 F.2d 853 (6th Cir. 1963); *Bakery & Confectionary Workers Intern. Union of America v. Great Atlantic & Pacific Tea Co.*, 357 F. Supp. 1322 (W.D. Pa. 1973), *aff'd mem.*, 491 F.2d 748 (3d Cir. 1974); *Abbington v. Dayton Malleable, Inc.*, 561 F. Supp. 1290 (S.D. Ohio 1983), *aff'd mem.*, 738 F.2d 438 (6th Cir. 1984).

The collective bargaining agreement in the present case provides no guarantees of continued employment. Hence, even if the present agreement had not been cancelled, damages would only be available for the time Continental would have been able to continue in business. In rejecting all of the appellants' damage claims, Judge Roberts relied upon a previous finding, not here appealed, "that had Continental not made its unilateral changes in pilot pay and work rules[ ] it would have been unable to con-

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[4] Although these cases were decided under the NLRA (the present contract is governed by the RLA), courts have often looked to decisions under the NLRA for guidance in RLA matters. *See generally Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426, 109 S. Ct. 1225, 1230, 103 L. Ed. 2d 456 (1989); *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383, 89 S. Ct. 1109, 1117-18, 22 L. Ed. 2d 344 (1969).

tinue its operations for very much longer for want of necessary cash," and that absent the implementation of the September 27 Emergency Work Rules, "Continental would have run ... [out] of cash" and "would have had to shut its doors even before this hearing commenced," that date being January 30,1984. Recognizing that if Continental went out of business, the employees would have no damage claims under the agreement, Judge Roberts held that no damages should be available under Section 502(g). Although the reasoning utilized by Judge Roberts in rejecting the claims parallels our own here, he failed to recognize that the finding relied upon suggests that Continental *could have* continued to operate under its labor contracts for *some* period of up to four months following September 27, 1983. As the employees operating under the agreement would have had a claim for damages — accruing until Continental ceased operations — had the contract not been rejected, they are entitled to contract rejection damages for the same period. These damages are to be considered unsecured claims measured by the differences in the rates of pay and fringe benefits set forth in the agreements and the pay and benefits actually received under the Emergency Work Rules.

2. Effect of the strike

The appellants contend that contract rejection damages should be available for the time the employees were out on strike. As noted above, the purpose of Section 502(g) is to give the same remedy as would be available had the contract not been rejected. Absent constructive dismissal by the employer,[5] employees who strike are not ordinarily entitled to back pay for the period for

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[5] In a previous order not here appealed, the bankruptcy court held that Continental's action in rejecting its collective bargaining agreements did not constitute a constructive discharge. *In re Continental Airlines Corp.*, 57 B.R. 845 (Bankr. S.D. Tex. 1985).

time they are on strike, even if the strike is in response to an unfair labor practice. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 n. 7, 61 S. Ct. 845, 854 n. 7, 85 L. Ed. 1271 (noting that the NLRB does not award backpay for an unfair labor practice strike); *J.H. Rutter-Rex Manuf. Co. v. NLRB*, 399 F.2d 356, 361 (5th Cir. 1968), *rev'd on other grounds*, 396 U.S. 258, 90 S. Ct. 417, 24 L. Ed. 2d 405 (1969) (liability for backpay to unfair labor practice strikers begins with application for reinstatement); Studio 44, Inc., 284 N.L.R.B. No. 67 at 13 n. 22 (1987) ("It is well settled that unfair labor practice strikers are not entitled to reinstatement and back-pay until they have made an unconditional offer to return to work"); Comfort, Inc., 152 N.L.R.B. 1074, 1090 (1965), *enforced, NLRB v. Comfort, Inc.*, 365 F.2d 867 (8th Cir. 1966). As no damages would have been available to Continental employees for the time when they were on strike outside of bankruptcy, none should be given in this instance.

The cases relied upon by the appellants do not dictate a different outcome. For example, the appellants cite our decisions in *Mungin v. Florida East Coast Railway Co.*, 416 F.2d 1169 (5th Cir. 1969) and *United Industrial Workers v. Board of Trustees of Galveston Wharves*, 400 F.2d 320 (5th Cir. 1968), *cert. denied*, 395 U.S. 905, 89 S. Ct. 1747, 23 L. Ed. 2d 219 (1969), in support of their contention that a back pay remedy is available for striking employees. In both of these cases the disputed actions of the carriers constituted violations of § 6 of the Railway Labor Act, for which we ruled that back-pay could be awarded as a sanction, calculated from the time of the wrongful discharge until the employees were reinstated pending bargaining. *Id.* at 328. We noted that the purpose of the sanction was to recreate, so far as possible, the status quo before the wrongful action was taken and to maintain it until the carriers complied with the good faith bargaining required by § 6 of the Act. *Id.* at 329.

The plaintiffs' reliance upon *Mungin* and *Galveston Wharves* in the present instance is misplaced. Continental's rejection of the collective bargaining agreement, unenforceable from the time of the bankruptcy filing, involved no statutory violation.[6] In consequence, we ave no such concern to preserve the status quo pending statutory compliance as we had in *Mungin* and *Galveston Wharves*. We noted the distinction between cases involving statutory violations and those involving breach of contract in both *Galveston Wharves* and *Mungin* when we stated: "'But the employees here do not claim backpay for a breach of contract. Their claim arises out of a violation of the federal statute. The contract-dispute cases therefore are not relevant.'" *Mungin*, 416 F.2d at 1177 (quoting *Galveston Wharves*, 400 F.2d at 327). Similarly, as the claims here involved are for contract rejection damages, our holdings concerning sanctions for statutory violations are not relevant.

Another case relied upon by the appellants, *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60 (2d. Cir. 1979), actually supports our ruling here. In *Carpenter*, an employer's unilateral change in wages and benefits prompted its union employees to strike. An Administrative Law Judge found the employer to have committed an unfair labor practice and ordered the strikers be reinstated with back pay. This order was modified by the NLRB to include a back pay award for the strike replacements as well. On appeal, the

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[6] In *Bildisco*, the Supreme Court ruled that "the filing of the petition in bankruptcy means that the collective-bargaining agreement is no longer immediately enforceable, and may never be enforceable again." 465 U.S. at 532, 104 S. Ct. at 1199. The Court held that an employer did not commit an unfair labor practice by unilaterally imposing new conditions of employment between the time of bankruptcy filing and the time the contract is either affirmed or avoided. *Id.* This holding has been superseded by statute. *See* 11 U.S.C. § 1113. The new statute does not apply, however, to bankruptcy petitions such as this one, filed before July 10, 1984.

court in *Carpenter* enforced only that portion of the Board's order which awarded back pay to the reinstated strikers. The appellants assume that the back pay was to run from the beginning of the strike. A reading of the Board's order itself, however, reveals that the award was to consist of "the difference between the wages and other economic benefits which [the workers] *actually received* and the economic benefits which they would have received absent Respondent's unlawful conduct." 238 N.L.R.B. 974, 976 (1978). The Board ruled that the employer's "liability for back pay shall commence as of the date of the employee's unconditional offer to return to work." *Id.* (citing Newport News Shipbilding and Dry Dock Co., 236 N.L.R.B. 1637 (1978)).

III. *Conclusion*

The September 10 order of the bankruptcy court granting the debtor's motion for partial summary judgment, which disallowed contract rejection damages for time periods the employees were out on strike, is AFFIRMED. The May 8 and June 26 orders of the bankruptcy court granting the debtor's motion for summary judgment, which disallowed all contract rejection damage claims of the appellants, are VACATED and the cause REMANDED for proceedings consistent with this opinion.

GARWOOD, Circuit Judge, dissenting in part.

I join all Judge Gee's cogent opinion save for what is, under the facts of this case, a relatively minor disagreement as to the employee-claimants' entitlement to damages. During the period in which Continental could have continued to operate under its labor contracts, as indicated in part B1 of the majority opinion, I would allow the striking employees to recover amounts not exceeding the difference between the rates and benefits actually

paid by Continental during that time and those that would have been paid had the provisions of the labor contracts been followed.

I agree that this is not a statutory violation or unfair labor practice act case. I also agree that the strikers were not constructively discharged. Nevertheless, under basic principles of contract law, when Continental clearly repudiated its labor contracts by unilaterally reducing the agreed rates of pay, the employees were no longer required to tender performance.[1] As appropriate work at Continental indisputably continued to be available to the striking employees, the doctrine of avoidable consequences prevents their recovery of what they could have thus earned had they not been on strike. But there is no justification for denying them recovery for the difference between the revised work rule pay rates (and benefits) and those of the labor contracts; to do so simply awards Continental a windfall.

A hypothetical example will illustrate my point. On January 1, A hires B to perform all of A's audit work, for as long during the year as A has need for such, with B's compensation to be at the rate of $5,000 a month. Sometime in June, A informs B that, because A believes good auditors are available at $3,500 a month, B's wages for the final half of the year will be only $3,500 a month. Accordingly, B then accepts, effective July 1, an offer for similar work from C which pays $4,000 a month for the July 1 to December 31 period, and A promptly hires a replacement for B who works throughout the same time for $3,500 a month. I would allow B to recover $6,000 from A. The majority would allow B no recovery. But if B had rejected C's offer and had continued (without waiving his contract rights) to work for A at the reduced $3,500 a month level, the majority would presumably allow B to

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[1] I note that the majority does not hold that the strike was illegal. If it were illegal, that would put the issue in a different context.

recover $9,000 from A, as it allows pre-strike recovery here.[2] That seems an unreasonable result which is not consonant with fundamental contract law.

I accordingly dissent from so much of the majority opinion as disallows all recovery for any striking employee during any of the time he or she was on strike.

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[2] If, in the latter situation, the majority limited B's recovery to $6,000 (on the theory that he could have mitigated his otherwise $9,000 damages by accepting C's offer), then the majority could not consistently deny B *all* recovery in the former situation (where he accepts C's offer).

APPENDIX B

APPENDIX B

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DISTRICT

U. S. Bankruptcy Court
Southern District of Texas
FILED

SEP 10 1985
By /s/_____
Clerk

In re	§	
	§	Case No. 83-04020-H1-5
CONTINENTAL AIR LINES, INC.,	§	(Chapter 11)
	§	
Debtor.	§	
	§	
In re	§	
	§	Case No. 83-04021-H3-5
TEXAS INTERNATIONAL AIRLINES, INC.,	§	(Chapter 11)
	§	
Debtor.	§	Consolidated Case No. 83-04019-H2-5

ORDER GRANTING DEBTORS' MOTION
FOR PARTIAL SUMMARY JUDGMENT

For the reasons set forth in the findings of fact and conclusions of law attached hereto, the Debtors' Motion for Partial Summary Judgment disallowing the claims for contract rejection damages filed by the Air Line Pilots Association, International and the

Union of Flight Attendants on behalf of pilots and flight attendants is hereby granted to the extent such claims include damages for striking pilots and flight attendants during the period of time they were on strike. The amount of such disallowance shall be determined in a hearing at which the identities of striking pilots and flight attendants and the periods of time they were on strike will be determined. In the alternative, in the event that the reference of the Motion for Partial Summary Judgment is withdrawn, the claims by ALPA and UFA for contract rejection damages on behalf of striking pilots and flight attendants are hereby estimated to have zero value. It is so

ORDERED and ADJUDGED this 10th day of September, 1985.

/s/ T. Glover Roberts
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DISTRICT

U. S. Bankruptcy Court
Southern District of Texas
FILED

SEP 10 1985
By /s/
Clerk

In re CONTINENTAL AIR LINES, INC., Debtor.	§	Case No. 83-04020-H1-5 (Chapter 11)
In re TEXAS INTERNATIONAL AIRLINES, INC., Debtor.	§	Case No. 83-04021-H3-5 (Chapter 11) Consolidated Case No. 83-04019-H2-5

UNCONTESTED FACTS AND CONCLUSIONS OF LAW RELATIVE TO DEBTORS'S MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO CONTRACT REJECTION CLAIMS OF STRIKERS

UNCONTESTED FACTS

1. On September 24, 1983, Continental Air Lines, Inc. and Texas International Airlines, Inc. filed petitions for

reorganization under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 1101, et seq. Upon filing the bankruptcy petition, Continental temporarily suspended all domestic service and on September 27, 1983, Continental began rebuilding that service by reinstating a limited portion of its domestic service, initially requiring fewer employees than immediately prior to bankruptcy. The active employees worked under "emergency work rules" and were generally paid lower wages and benefits than they had received before the filing of the petition. [see cites in paragraph 3-6 below].

2. In response to Continental's implementation of the emergency work rules, the Air Line Pilots Association, International ("ALPA") and the Union of Flight Attendants ("UFA") called strikes which began October 1, 1983. The ALPA strike has continued to the present. The UFA strike was terminated on April 17, 1985 when the union instructed its members to offer unconditionally to return to work.

3. Continental filed a Motion To Reject its collective bargaining agreements with ALPA and UFA on September 27, 1983. Following an extended hearing this Court approved Continental's motion to reject its collective bargaining agreements with ALPA (Order of June 19, 1984) and UFA (Order of December 5, 1984). Each contract rejection is retroactive to September 24, 1983.

4. This Court has previously found that "had Continental not made its unilateral changes in pilot pay and work rules, it would have been unable to continue its operations for very much longer for want of necessary cash and, because it could not compete effectively with the low cost carriers in direct competition with it, it would have continued losing money until it closed its doors."

Findings of Fact And Conclusions of Law Relating To The Rejection Of The Collective Bargaining Agreement With ALPA ¶ 28; see In re Continental Airlines Corp., 38 B.R. 67, 71-72 (Bankr. S.D. Tex. 1984); Memorandum Of Authorities Authorizing Rejection Of ALPA Collective Bargaining Agreement at 12-13, 30. The Court also found that "without substantial concessions from [the UFA] contracts, Continental would run out of money and go out of business." Findings of Fact And Conclusions of Law Relating To the Rejection Of Collective Bargaining Agreements with UFA at 8.

5. This Court has further found that the emergency work rules applicable to pilots and flight attendants were modeled on work rules in use at Braniff Airways, Inc. and Southwest Air Lines, and that a substantial proportion of the unionized employees at Continental have indicated, by electing to cross the picket lines, "their willingness to work at the wage levels and under the working conditions (including increased productivity) offered by Continental." Memorandum Of Authorities Authorizing Rejection Of ALPA Collective Bargaining Agreements at 47-48; see Findings Of Fact And Conclusions Of Law Relating To The Rejection Of The Collective Bargaining Agreement With ALPA at ¶¶ 31, 32; Findings Of Fact And Conclusions Of Law Relating To The Rejection Of Collective Bargaining Agreements With UFA at 6-7, 10.

6. This Court's previous findings make clear that the striking pilots retained their status as employees during the time they were on strike. See Memorandum of Authorities Authorizing Rejection Of ALPA Collective Bargaining Agreement at 22, 23-24. This Court has also found that upon filing its petitions for reorganization, "Continental immediately went on a campaign to get the remaining pilots to agree to fly under the emergency work

rules," and that once ALPA's October 1, 1983 strike began, "Continental maintained a telephone 'bank' in which pilots were called and requested to fly." Memorandum Of Authorities Authorizing Rejection Of ALPA Collective Bargaining Agreements at 22. This Court has further found that Continental "made a strenuous effort to get striking pilots to return to service," and upon "instructions from its chief operating officer, Continental delayed hiring [replacement] pilots until it felt it had to do so to service its re-expanding route system." Id. at 22-23.

7. ALPA and UFA have filed claims in this Court for contract rejection and other damages on behalf of all pre-petition pilots and flight attendants, respectively. Continental has sought summary judgment disallowing the contract rejection damage claims insofar as they seek to recover backpay and other benefits for striking employees during the time they were on strike.

8. The unions have asserted in response that their striking members should not be denied damages because (a) they were not really on strike at all, but rather were simply withholding their services (this position was abandoned at oral argument); (b) federal labor law does not apply to the determination of employee claims in bankruptcy proceedings; and (c) the changes in wages and work rules on September 24, 1983, should be treated as wrongful "constructive" discharges of affected employees.

CONCLUSIONS OF LAW

1. As originally filed on April 30, 1985, Debtors' Motion requested this Court to enter summary judgment in Debtors' favor on the issue of liability for contract rejection damages for strikers, pursuant to Section 502(b)(1).

2. On June 3 and 4, 1985, ALPA and UFA filed motions pursuant to 28 U.S.C. § 157(d) seeking to withdraw the reference of this Motion from the Bankruptcy Court on grounds that Debtors' Motion "required the consideration of federal laws regulating interstate commerce," i.e., the Railway Labor Act, 45 U.S.C. § 151 et seq., and that withdrawal of the reference was therefore mandatory. The unions' motions remain pending in the District Court.

3. On June 3, 1985, ALPA and UFA, joined by the Official Union Labor and Pension Creditors' Committee, filed a Motion to Stay this Court's consideration of the present motion pending District Court disposition of the Section 157(d) Motion to Withdraw Reference. After hearing, this Court entered an Order denying the Motion, filed July 8, 1985, which found, inter alia, as follows:

> To interpret Section 157(d) as the unions propose would disrupt the claims procedure so carefully crafted in the Bankruptcy Code, by bifurcating the claims resolution process between the District Court and the Bankruptcy Court. As a practical matter, such a result would be intolerable. Not only would the Bankruptcy Court be abandoning a statutorily-charged responsibility, but it would be thrusting upon the District Court additional litigation in an already overcrowded arena, a scenario that is not only costly and time consuming, but also a ridiculously circuitous route in the bankruptcy case administration process.

Order filed July 8, 1985 at 4-5.

4. Subsequently, on July 16, 1985, Debtors filed a Motion to Estimate All Contingent Or Unliquidated Employee Claims For

Purposes Of Confirmation Pursuant To Bankruptcy Code Section 502(c) And To Convert Pending Motions For Summary Judgment To Motions To Estimate The Value Of Claims. While Debtors' position denying all liability for such claims had not and has not changed, Debtors' proposed procedures changed, according to the Debtors' view, only the estimation process could produce allowance of claims for Plan purposes in a time frame sufficient to avoid delay in the closing of this case.

5. On June 25, 1985, this Court entered an Order Granting Debtors' Motion for Extension of the Exclusivity Period up to September 5, 1985 upon the express condition that no further extensions would be granted and that the Debtors would, in fact, file a proposed Plan of Reorganization on that date.

6. The Court is satisfied that it has jurisdiction to resolve on the merits the liability issues presented by the present motion, for the motion does not require direct interpretation or application of the statutory language of the Railway Labor Act or any other federal statute regulating interstate commerce. The question rests squarely in the bankruptcy claims adjudication process.

7. There are on file in this major reorganization proceeding at least three other § 157(d) motions to withdraw the reference which have been pending undecided on the crowded docket of the District Court for this district for over one year. See Motion Of Union Of Flight Attendants For Withdrawal Of The Reference Of Debtors' Motion To Reject Collective Bargaining Agreement Under The Railway Labor Act, filed September 7th, 1984; Motion Of Air Line Pilots Association For Withdrawal Of The Reference Of Debtors' Motion To Reject Collective Bargaining Agreement Under The Railway Labor Act, filed August 3, 1984; Motion By International Association Of

Machinists And Aerospace Workers To Withdraw The Reference To The Bankruptcy Court Of The Debtors' Motion To Reject Collective Bargaining Agreements, filed July 20, 1984. The pendency of the § 157(d) motions and the novel and arcane nature of the issues arising from this recently enacted provision could create substantial potential difficulties in the administration of this bankruptcy case and to the bankruptcy system in general. In the opinion of this Court, it is for this reason that those courts which have considered this issue have held that § 157(d) must be narrowly construed to avoid disrupting the Bankruptcy Court system constructed by the Bankruptcy Reform Act of 1978.

While this Court has concluded that it has jurisdiction to enter summary judgment on liability on the present motion, the questions raised regarding the applicability of § 157(d) to this motion for summary judgment, as well as the pendency in the District Court of the unions' motions to withdraw reference, have the potential for substantially delaying the closing of this reorganization. For this reason, the Court has determined that it will also estimate the value of the claims subject to this Motion pursuant to § 502(c) of the Bankruptcy Code. Since estimation is clearly a "core proceeding" and a function within the jurisdiction of the Bankruptcy Court, use of the estimation procedure by this Court will allow the now on file Debtors' Reorganization Plan to proceed without unnecessary or cost delay to the Debtor or creditor groups who may have reached agreement relative to debt repayment. The estimation procedure can, however, be simplified by resolution of the summary judgment issues now on file by the Court's review of facts previously established in the case and application of the appropriate law.

8. Section 502(b)(1), 11 U.S.C. § 502(b)(1), provides that a claim against an estate in bankruptcy is to be disallowed if such

claim "is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." The value of a bankruptcy claim for contract breach must therefore be determined in precisely the same way that such a claim would be determined if the bankruptcy had not occurred. In re Nuisance Corp., 17 Bankr. 80, 82 (Bankr. D.N.J. 1981); 3 Collier on Bankruptcy ¶ 502.02, at 502-24 et seq. (15th ed. 1985). A bankrupt in breach of contract pursuant to 11 U.S.C. § 365(g) may assert any defense to the liability flowing from statutorily created breach which any other promisor in breach of contract may assert. Mazirow v. Grigsby (In re White Motor Corp.), 44 Bankr. 563 (N.D. Ohio 1984).

9. The Bankruptcy Court must determine the allowability of claims by applying the appropriate substantive law which would be applied in the non-bankruptcy context. See, e.g., Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Development Co., 642 F.2d 744, 748 n.8 (5th Cir. 1981); Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 161 (1946).

10. The rejected contracts were entered into pursuant to the Railway Labor Act ("RLA"), 45 U.S.C. § 151 et seq., as expressly stated at the outset of each contract. A Railway Labor Act contract, "like the Labor Management Relations Act § 301 contract, is a federal contract and is therefore governed and enforceable by the federal law, in the federal courts." IAM v. Central Airlines, Inc., 372 U.S. 682, 692 (1963). The Supreme Court has also held that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." Textile Workers of America v. Lincoln Mills of Ala., 353 U.S. 448, 456 (1957).

11. Under well-established principles of federal labor law, striking employees are not entitled to back pay for the period of time they are on strike, even if the strike is in response to an unlawful unfair labor practice by the employer. See, e.g., Safeway Trails, Inc., 233 N.L.R.B. 1078, 1083 (1977), enf'd, 641 F.2d 930 (D.C. Cir. 1979), cert. denied, 444 U.S. 1072 (1980); Ace Tank & Heater Co., 167 N.L.R.B. 663, 664 (1967); Comfort, Inc., 152 N.L.R.B. 1074, 1090 (1965), enf'd in part, 365 F.2d 867 (8th Cir. 1966). The basis for this principle that the employee's voluntary act of going on strike is an intervening cause of his loss, for which the employer is not legally answerable because alternative legal remedies were available to the employee.

> An employer is . . . only indirectly responsible for the loss of employment suffered by a striker even when the strike has been precipitated by unfair labor practices. The loss of employment is attributable to the striker's own voluntary act in withholding his services until the unfair labor practices have been remedied by the strike rather than by available forms of legal redress. It is for this reason that a striker — even an unfair labor practice striker — unlike a discriminatee, is not entitled to backpay until he has made an application for reinstatement which has been denied.
>
> For the same reason it would seem that a striker is not entitled to be made whole for the loss of any benefits which he may have incurred as a result of going out on strike.

Cone Bros. Contracting Co., 158 N.L.R.B. 186, 197 (1966). These principles are equally applicable under the Railway Labor Act. Empresa Ecuatoriana de Aviacion v. Dist. Lodge No. 100, 690 F.2d 838, 847 (11th Cir. 1982), cert. dismissed, 104 S. Ct. 40

(1983); National Airlines, Inc. v. IAM, 416 F.2d 998, 1097 (5th Cir. 1969), after remand, 430 F.2d 957, 961 (5th Cir. 1970).

12. Application of federal labor law to claims arising under RLA contracts may not be avoided by labeling a breach of contract claim as a "wrongful discharge." Andrews v. Louisville & N. R. Co., 406 U.S. 320, 323-34 (1972); see also Schroeder v. Trans World Airlines, Inc., 702 F.2d 189, 192 (9th Cir. 1983); cf. Allis Chalmers v. Lueck, 105 S. Ct. 1904, 1910-11 (1985). Federal labor law therefore controls the determination of remedies for breach of these RLA collective bargaining agreements.

13. The attempt to characterize the changes in pay rates and work rules on September 24, 1983 as a wrongful "constructive" discharge fails in any event because none of the prerequisites to a finding of wrongful constructive discharge can be met. A constructive discharge is an imputed, rather than an actual, discharge; it may be imputed by law where an employer acts to make conditions intolerable with the intent and effect of forcing the employee to quit. In order to find that the changes in rates of pay and working conditions implemented on September 24, 1983 constituted a wrongful constructive discharge en masse, a court would have to conclude (1) that the pilots and flight attendants actually terminated their employment as a result of those changes; (2) that Continental acted without business justification and with anti-union animus in making the changes; (3) that the changes created by the emergency work rules were intolerable; and (4) that the changes were in some way unlawful and "wrongful," i.e., they must violate a legal duty owed by the employer to the employee, such as the duty not to discriminate on the basis of union membership. See NLRB v. Cable Vision, Inc., 660 F.2d 1 (1st Cir. 1981); J.P. Stevens & Co. v. NLRB, 461 F.2d 490, 494 (4th Cir. 1972); Newspaper Guild of Boston v. Boston

Herald-Traveler Corp., 238 F.2d 471, 472 (1st Cir. 1956); Guardian Ambulance Serv., 228 N.L.R.B. 1127, 1130 (1977); Highland Avenue Convalescent Home, Inc., 220 N.L.R.B. 998 (1975).

14. There is no evidence per the previous Findings of the Court that the events of September 14, 1983 included mass termination, either actual or constructive of pilots or flight attendants. The unions do not claim that their members were actually involuntarily discharged on September 24, 1983, nor do they claim that the strikers voluntarily terminated their employment. This Court's previous finding that Continental began strenuous efforts to get the pilots to return to work immediately after filing its bankruptcy petitions further refutes the constructive discharge claim.

15. Continental did not lack a business justification for the changes in wages and work rules. This Court has already expressly found compelling business justifications for Continental's actions, and has rejected a claim by these unions that Continental acted in bad faith in implementing new work rules on September 24.

16. The changes in wages, work rules and working conditions for Continental pilots and flight attendants on September 24, 1983 were not legally "wrongful" because they were approved as legal and proper by this Court's June 19, 1984 and December 5, 1984 decisions allowing the rejection of the collective bargaining agreements with ALPA and UFA, respectively. In accordance with NLRB v. Bildisco & Bildisco, 104 S. Ct. 1188 (1984), this Court held that the changes in wage rates and work rules implemented by Continental on September 24, 1983 "were accomplished not by the employer's unilateral action, but rather by operation of law." Memorandum of Authorities Authorizing

Rejection of ALPA Collective Bargaining Agreement at 35 (emphasis in original). The Bankruptcy Court also rejected the unions' claim that the implementation of wage rates and work rules that differed substantially from those in the collective bargaining agreements would violate the status quo provision of the Railway Labor Act, 45 U.S.C. § 156. See Memorandum Of Authorities Authorizing Rejection Of ALPA Collective Bargaining Agreements at 30-31. The Bankruptcy Court held that "the rationale of the Supreme Court in Bildisco is equally applicable to the Railway Labor Act and the status quo provisions of that Act must give way to the realities of bankruptcy." Memorandum of Authorities at 37-38. Thus, in accord with the Supreme Court's ruling in Bildisco, this Court expressly held that the rejection of Continental's labor agreements and the changes in wages and work rules implemented on September 24, 1983 did not violate the Railway Labor Act. Memorandum of Authorities at 38-39.

17. This Court's prior decisions approving rejection are the law of this case and as such are binding on the unions, and cannot be collaterally attacked in this claims proceeding. See Arizona v. California, 460 U.S. 605, 618 (1983); Messenger v. Anderson, 225 U.S. 436 (1912); White v. Murtha, 377 F.2d 428, 431 (5th Cir. 1967).

18. The contention that the denial of contract rejection damages to strikers would unlawfully discriminate against them vis-a-vis non-strikers must also be rejected. "The axiom that an employer need not remunerate strikers for work not performed means simply that it is no more discriminatory for an employer to deny compensation for absence due to strike than to deny it for any other period of absence." Kimberly-Clark Corp., 171 N.L.R.B. 614, 621 (1968). An award of contract rejection

damages to employees striking a bankrupt company would grant them a windfall not enjoyed by employees striking a solvent company, a completely anomalous result.

19. The contention that the contract rejection claims of striking employees are "minor disputes" which must be resolved through binding arbitration before an adjustment board lacks merit for two reasons. First, a Bankruptcy Court has not only jurisdiction, but also responsibility to decide all claims against an estate. 28 U.S.C. §§ 1334(a), 157(a), (b)(1), (b)(2)(B). A determination whether to let a particular dispute be decided in another forum is committed to the Bankruptcy Court's absolute discretion. See, e.g., Zimmerman v. Continental Air Lines, Inc., 712 F.2d 55 (3d Cir. 1983), cert. denied, 104 S. Ct. 699 (1984); In re F&T Contractors, Inc., 649 F.2d 1229 (6th Cir. 1984). Second, a Bankruptcy Court's exercise of discretion is to be guided by whether in the circumstances of a particular case a specialized tribunal might provide a more efficacious means of resolving a dispute. See, e.g., In re Brookhaven Textiles, Inc., 21 B.R. 204, 207 (Bankr. S.D.N.Y. 1982). The question of strikers' entitlement to contract rejection damages is a question of law which presents no need for either a specialized tribunal or particularized expertise, inasmuch as the breach of contract is already established and the sole issue is whether strikers are entitled to damages under federal labor law. See In re Muskegon Motor Specialties Company, 313 F.2d 841, 843 (6th Cir. 1963).

20. This motion presents a pure issue of law — whether strikers are entitled to damages for lost future wages and fringe benefits for the time periods in which they withheld their services from the Debtors. To decide this motion, this Court need not decide any factual issues — such as who precisely was on strike and when; whether the strikers failed to mitigate damages; how

many employees were on strike; or the total amount by which the claims would be reduced if the Debtors prevailed on this motion.

21. No affidavits or other admissible evidence have been offered to establish that there is a genuine dispute as to any material fact. Because this Court is persuaded that Continental is entitled to judgment as a matter of law, partial summary judgment is appropriate and will be granted. See Fed. R. Civ. P. 56(e).

22. For the foregoing reasons, the union claims for contract rejection damages will be disallowed to the extent they seek damages for striking employees for any period of time during which the employees on whose behalf the claims were asserted were on strike. At an evidentiary hearing to be held on the claims, the Court can proceed to determine the amount by which the unions, claims should be reduced due to their strikes against Continental.

23. This Court has previously held, and reaffirms here, that it does not believe that Continental's motion for partial summary judgment presents issues whose resolution requires the consideration of federal laws regulating activities affecting interstate commerce within the meaning of 28 U.S.C. § 157(d). The Court here interprets the phrase "federal Laws" to mean "federal statutes". Although Continental's objections to the unions' claims at issue herein can in some respects be said to arise out of federal labor law, the resolution of Continental's motion has not required the interpretation of any federal statute or the balancing of competing federal policies. Recognizing, however, that the unions have filed motions to withdraw the reference of Continental's motion from the Bankruptcy Court, this Court in the interest of efficiency and economy to the Court as well as the parties hereby rules in the alternative that the value of the unions'

claims for contract rejection damages on behalf of striking employees for the period of time they were on strike is estimated pursuant to 11 U.S.C. § 502(c) to be zero.

The above findings and conclusions are hereby made a part of and incorporated in the attached Order Granting the Motion for Summary Judgment. It is so

ORDERED and ADJUDGED this 10th day of September, 1985.

/s/ T. Glover Roberts
UNITED STATES BANKRUPTCY JUDGE

APPENDIX C

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:

CONTINENTAL AIRLINES CORPORATION,	83-04019-H2-5
CONTINENTAL AIR LINES, INC.	83-04020-H1-5
TEXAS INTERNATIONAL AIRLINES, INC.,	83-04021-H3-5
TXIA HOLDINGS CORPORATION,	83-04022-H3-5
	Consolidated Case No. 83-04019-H2-5

Debtors

ORDER

For the reasons set forth in the findings of fact and conclusions of law attached hereto, the motion of Debtors for summary judgment disallowing the Union of Flight Attendants claims for contract rejection damages is hereby granted. In the alternative, such claims for contract rejection damages are hereby estimated to have zero value. It is

ORDERED AND ADJUDGED this the 8th day of May, 1986.

/s/ T. Glover Roberts
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:

CONTINENTAL AIRLINES CORPORATION,	83-04019-H2-5
CONTINENTAL AIR LINES, INC.	83-04020-H1-5
TEXAS INTERNATIONAL AIRLINES, INC.,	83-04021-H3-5
TXIA HOLDINGS CORPORATION,	83-04022-H3-5
	Consolidated Case No. 83-04019-H2-5

Debtors

FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO THE UNION OF FLIGHT ATTENDANTS CLAIMS FOR CONTRACT REJECTION DAMAGES

The following facts are either stipulated, uncontested or established by the evidentiary record in this case in previous matters, of which the Court takes notice and is considered a proper and adequate basis on which to make these Findings and Conclusions:

FINDINGS OF FACT

1. On September 24, 1983, Continental Airlines, Inc. and Texas International Airlines, Inc. (hereinafter "Continental") filed petitions for reorganization under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 1101, et seq.

2. Thereafter, Continental filed a motion pursuant to § 365(a) of the Bankruptcy Code, 11 U.S.C. § 365(a), to reject (a)

the collective bargaining agreement between Continental and the Union of Flight Attendants. After an extended evidentiary hearing, the Court, on December 5, 1984 entered its order rejecting two collective bargaining agreements between the Debtors and the Union of Flight Attendants ("UFA") that had been in effect on the day Debtors filed their bankruptcy petitions. Order Allowing Rejection of Collective Bargaining Agreements (Dec. 5, 1984). On April 30, 1985, UFA filed a proof of claim for $409,190,273.00 in contract rejection damages, including damages for lost future wages and benefits in the amount of approximately $299,140,000.

3. By their terms, the UFA contracts were to expire on October 1, 1983 (as to the Debtors' DC-9 flight attendants) and on December 1, 1984 (as to the Debtors' Boeing 727 and DC-10 flight attendants). The latter contract included provisions which permitted reopening of the contract prior to the expiration date in the event of certain government actions regarding deregulation or the acquisition of new types of aircraft. Debtors take the position that the Boeing 727 and DC-10 contract was properly reopened by virtue of a February 4, 1983 letter from Continental to UFA requesting negotiations under the authority of these provisions. The DC-9 contract was reopened in August 1983.

4. In its proof of claim, UFA claimed lost future wages and benefits as contract rejection damages for the period September 24, 1983 through and including May 31, 1986, as to both UFA contracts. The Union Committee asserts that these employee claims for damages are the difference between what they would have earned had they continued to work under the contract and what they in fact earned.

5. On September 20, 1985, Continental (hereinafter Debtors) filed a Motion to Estimate the Vale of the UFA Claims for Contract Rejection Damages at Zero Value and for Summary Judgment disallowing these claims in their entirety. UFA and the Union Committee strongly opposes both motions.

6. The UFA contracts relative to the motion here are in evidence in the record described above of which this Court has taken notice. These contracts are clear and unambiguous. It appears that: (a) They do not contain any guarantee of employment; (b) Each contract contains terms as to the wages and working conditions which will be provided to employees covered by the agreements when work is available; and (c) Each contract provides that, when work is not available, management may furlough employees, subject to notice of furlough and furlough pay requirements, which themselves are subject to exceptions for various contingencies not within management's control.

7. At the time of the filing of the bankruptcy petitions in this matter, the Debtors unilaterally modified work rules and reduced wages and fringe benefits paid to flight attendants represented by UFA as well as those of pilots and other employees, pending this Court's approval of the Debtors' motion to reject the contracts under 11 U.S.C. § 365. In re Continental Airlines Corp., 38 Bankr. 67 (Bankr. S.D. Tex. 1984). This Court approved the rejection of the flight attendant contracts, effective retroactively to September 24, 1983, in accordance with 11 U.S.C. § 502(g). This Court has already found that if Debtors had not made changes in their labor contracts, including specifically the UFA contracts, within a short time the Debtors would have run out of cash and gone out of business. Findings of Fact and Conclusion of Law Relating To The Rejection of Collective Bargaining Agreements

With UFA (December 5, 1984) at 8; Memorandum of Authorities Authorizing Rejection of Air Line Pilots Association Collective Bargaining Agreements (August 17, 1984) at 33; Findings of Fact and Conclusions of Law Relating To The Rejection Of The Collective Bargaining Agreement With ALPA (August 17, 1984) at ¶¶ 28, 40.

CONCLUSIONS OF LAW

1. The unions contend that this Court, which rejected the ALPA and UFA collective bargaining agreements pursuant to the Bankruptcy Code itself, 11 U.S.C. § 365, now does not have jurisdiction to liquidate the claim or to estimate the value of any damages created thereby through the Bankruptcy Code "breach" of these contracts. 11 U.S.C. § 365(g). This contention is clearly without merit. Bankruptcy courts have jurisdiction to decide the allowability of all claims against an estate. 28 U.S.C. §§ 1334(a); 157(a), (b)(1), (b)(2)(B).

2. The Court has jurisdiction to resolve on the merits the question of liability, if any, and damage claims for contract rejection presented by the present motion. The motion does not require direct interpretation or application of the statutory language of Federal Labor Statute or any other federal statutes regulating any interstate commerce, and therefore § 152(d) is inapplicable here. The question rests squarely in the bankruptcy claims adjudication process. 11 U.S.C. § 502. In re Continental Air Lines, Inc., Order Granting Debtors' Motion to Estimate, 57 B.R. 841 (S.D. Tex. 1985).

3. Further, use of the estimation procedure by this Court will allow the Debtors' reorganization plan to proceed without unnecessary or costly delay to the Debtor or other creditor groups

who may have reached agreement relative to debt repayment. The estimation procedure can, however, be simplified by resolution of the summary judgment issues now on file by the Court's review of undisputed facts and facts previously established in the case, and application of the appropriate law.

4. The courts have recognized that bankruptcy judges have discretion to determine the allowability of claims in bankruptcy even if the claim ordinarily would have been liquidated by another tribunal. Of course, in the absence of bankruptcy, every claim would have been resolved in another forum. In Zimmerman v. Continental Air Lines, Inc., 712 F.2d 55, 56 (3d Cir. 1983), cert. denied, 104 S.Ct. 699 (1984), a manufacturing company entered into a contract with Continental which contained an arbitration clause. The Arbitration Act, 9 U.S.C. §§ 1-208, "requires a federal court to stay proceedings pending arbitration if issues pertinent to the dispute are also the subject of an arbitration agreement between the parties." 712 F.2d at 56. Subsequently, the manufacturing company went into bankruptcy and initiated adversary proceedings against Continental alleging that Continental's claim under the contract was improper. Under the authority of the Arbitration Act, Continental requested that the matter be deferred to arbitration.

The bankruptcy court there denied Continental's request, the Third Circuit affirmed, and the Supreme Court denied certiorari. Relying on the policies underlying the 1978 Bankruptcy Reform Act, the Third Circuit held that the Act impliedly modified the express provisions of the Arbitration Act. 712 F.2d at 56, 59.

> Bankruptcy proceedings, however, have long held a special place in the federal judicial system. Because of their importance to the smooth functioning of the nation's commercial

> activities, they are one of the few areas where Congress has expressly preempted state court jurisdiction. See 28 U.S.C. § 1334. While the sanctity of arbitration is a fundamental federal concern, it cannot be said to occupy a position of similar importance. Therefore, because of the importance of bankruptcy proceedings in general, and the need for the expeditious resolution of bankruptcy matters in particular, we hold that the intentions of Congress will be better realized if the Bankruptcy Reform Act is read to impliedly modify the Arbitration Act. Thus while a bankruptcy court would have the power to stay proceedings pending arbitration, the use of this power is left to the sound discretion of the Bankruptcy Court.

712 F.2d at 59-60 (emphasis supplied).

5. Citing Gary Aircraft Corp. v. United States (In re Gary Aircraft Corp.), 698 F.2d 775 (5th Cir.), cert. denied, 104 S.Ct. 82 (1983), the unions further argue that bankruptcy courts lack jurisdiction to disallow claims in disputes that Congress has committed to a specialized tribunal. The unions' reliance on Gary Aircraft is misplaced. Gary merely established that, under the 1898 Act, bankruptcy courts ordinarily should defer to the Armed Services Board of Contract Appeals ("ASBCA") for the liquidation of claims arising from government defense contracts. (The Gary case factually originated with Gary filing a claim under its contract against the government, with the government filing a counter claim.) The case does not provide that bankruptcy courts have no "jurisdiction" over such claims. Moreover, the Fifth Circuit based its decision on its findings that deferral would not impair the satisfaction of other bankruptcy claims and that government contracts are extremely complex, technical and esoteric, 698 F.2d at 782, not on the proposition that every claim

in bankruptcy which otherwise would have been decided by a "specialized tribunal" should be liquidated by that tribunal.

To the contrary, the Fifth Circuit expressly acknowledged that, where bankruptcy court estimation or liquidation by the ASBCA would unduly delay the administration of the estate, the bankruptcy court retains the power under the 1898 Act to disallow the claim in its entirety. 698 F.2d at 784 n.7. Under the 1978 Bankruptcy code, which applies to this proceeding, the authority of a bankruptcy court to estimate the value of unliquidated claims is, if anything, even stronger, since new 11 U.S.C. § 502(c) requires the court to estimate the value of unliquidated claims where liquidation would unduly delay reorganization.[1] The 1978 Act significantly expanded bankruptcy subject matter jurisdiction:

> [The 1978 Act] evidenced a strong Congressional or federal policy in favor of the newly created bankruptcy court having jurisdiction which is sufficiently broad to promptly and expeditiously hear and determine all controversies involving matters of law, equity and even admiralty.

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[1] See Addison v. Langston (In re Brints Cotton Marketing, Inc.), 737 F.2d 1338, 1340-41 (5th Cir. 1984); In re Curtis, 40 Bankr. 793, 801 n.7 (W.D. La. 1984); In re Nova Real Estate Investment Trust, 23 Bankr. 62, 65 (Bankr. E.D. Va. 1982); In re Brada Miller Freight Systems, Inc., 8 Bankr. 62 (Bankr. N.D. Ala. 1980); 3 Collier on Bankruptcy ¶ 502.03 at 502-74, 75 (15th ed. 1985). Accordingly, even if this Court did not have jurisdiction to disallow the claim, it is clear that the Court nevertheless would have jurisdiction to estimate the value of the contract rejection claims. Order Granting Debtors' Motion to Estimate All Contingent Unliquidated Employee Claims For Purposes of Chapter 11 Confirmation Pursuant to Section 502(c) of the Bankruptcy Code (Sept. 26, 1985). Thus, for example, courts may estimate the value of claims asserted on behalf of employees by the NLRB, without deferring to any NLRB administrative process, which might otherwise apply. In re Unit Parts Co., 9 Bankr. 386 (W.D. Okl. 1981) (court rejects the same arguments and authorities presented by the unions here, refusing to defer to NLRB, noting that these authorities predate the 1978 expansion of bankruptcy court jurisdiction).

In re Cross Electric Co., 9 Bankr. 408, 410 (Bankr. W.D. Va. 1981); see Zimmerman v. Continental Airlines, Inc., supra, 712 F.2d at 56.

6. In addition, the Debtors' motion for summary judgment and estimation in this claims proceeding presents a very different case for bankruptcy court resolution of the issues than was present in Gary. First, unlike Gary, the time necessary to complete arbitration of the unions' multi-million dollar contract rejection claims could seriously impair the claims and interests of the substantial body of other creditors who have already settled with the debtors and now await distribution. As pointed out in another case, in Gary, "the only asset of the bankrupt's estate . . . consisted of a . . . contractual claim against the United States government." In re Compton Corp., 40 Bankr. 880, 884 (Bankr. N.D. Tex. 1984). Where resolution of a claim could "affect the amount, existence and priority of claims to be paid out of the general funds, and, thus involve the interest of other creditors," courts have held that a bankruptcy judge does not abuse his discretion in refusing to compel arbitration of such a claim. In re F&T Contractors, Inc., 649 F.2d 1229, 1232 (6th Cir. 1981); see Johnson v England, 356 F.2d 44, 51-52 (9th Cir.), cert. denied, 384 U.S. 961 (1966). Moreover, since "[p]rotection of general creditors is a major function of . . . bankruptcy proceedings," submission of the union claims to arbitration would be particularly unsound because Continental's creditors have not consented to arbitration and would have no right to participate in the arbitration process. 649 F.2d at 1233 n.1; 356 F.2d at 52.[2]

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[2] In addition, in arbitration there would be no right to discovery, arbitrators are less likely to follow legal standards than courts, and judicial review would be limited. See Zimmerman, Cross and Johnson, supra.

Second, unlike the ASBCA in Gary, RLA arbitration panels (system boards of adjustment) are not specialized tribunals with particular expertise in the specific issues of fact that must be resolved in order to value the claim as it relates to this proceeding. If presented to a system board, bankruptcy contract rejection claims would be decided by arbitrators who would not necessarily be more familiar with the particular contract language or past practice of the parties than is this Court, and who may, like this Court, have to take evidence and hear testimony in order to resolve any actual issues of fact, if any exist. Unlike the Court, however, the arbitrators would have no cognizance of the reorganization or the interests of other creditors. Particularly, in these circumstances, deferral to arbitration is not required. See In re Amalgamated Foods, Inc., 41 Bankr. 616, 617, 619 (Bankr. C.D. Cal. 1984) (debtor need not submit ERISA claims to arbitration since bankruptcy claims process adequate to resolve claims).

Third, Gary was decided under the 1898 Act. Bankruptcy courts which have considered Gary generally have found it inappropriate to defer claims to another forum in cases under the 1978 Code. For example, in Amalgamated Foods, the court refused to defer a claim under the Employee Retirement Income Security Act ("ERISA") to arbitration even though the statute contains a mandatory arbitration procedure. Distinguishing Gary and Nathanson v. NLRB, 344 U.S. 25 (1952), the court rejected the creditor's contention that the claim required expertise not possessed by the court. 41 Bankr. at 618-619. Comparing the bankruptcy claims process under the 1978 Bankruptcy Reform Act to ERISA's statutory arbitration procedure, the court concluded that both procedures furthered the policy of speedy disposition.

> I find that the bankruptcy claims procedure achieves the goal sought by ERISA arbitration —indeed, that the claims procedure may serve that goal better than ERISA arbitration itself. For that reason, I hold that the debtor may bypass arbitration in favor of the claims procedure.

41 Bankr. at 616-617. See also In re Page-Wilson Corp., 37 Bankr. 527, 529 (Bankr. D. Conn. 1984); In re Compton Corp., supra, 40 Bankr. at 884.

These cases are undoubtedly correct, since the Bankruptcy Reform Act of 1978:

> [S]ignificantly expands the jurisdiction of the bankruptcy courts and is based on the notion that to protect the positions of both the bankrupt and its creditors, bankruptcy actions should not be subject to unnecessary delay and all claims and issues relevant to such action should be resolved in one expeditious proceeding.

Zimmerman v. Continental Air Lines, supra, 712 F.2d at 56 (emphasis supplied).[3]

7. Finally, and most conclusively, as UFA itself points out in its opposition, at 6, in NLRB v. Bildisco & Bildisco, 104 S. Ct. 1188 (1984), the Supreme Court said that claims for damages arising out of the bankruptcy court's own rejection of a collective

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[3] The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, did not detract from bankruptcy court subject matter jurisdiction, but merely allocated the exercise of that jurisdiction between the bankruptcy and district courts. 28 U.S.C. § 1334; 1 Collier on Bankruptcy ¶ 3.01 at 3-19 to 3-29 (15th ed. 1985); Carlton v. BAWW, Inc., 751 F.2d 781 (5th Cir. 1985).

bargaining agreement must be adjudicated in the bankruptcy court.

> [C]laims arising after filing, such as result from the rejection of an executory contract, must also be presented through the normal administration process by which claims are estimated and classified. See 11 U.S.C. § 502 (g); In re Hoe & Co., Inc., 508 F.2d 1126, 1132 (2d Cir. 1974); Workman v. Harrison, 282 F.2d 693, 699 (10th Cir. 1960). Thus, suit may not be brought against the debtor-inpossession under the collective bargaining agreement; recovery may be had only through administration of the claim in bankruptcy.

104 S. Ct. at 1198-99 (emphasis supplied). Thus, Gary presents no obstacle to the resolution of this Court of the Claims issues, and the unions' jurisdictional objections are totally without merit.

8. Although the rejection of an executory contract constitutes a breach of that contract, 11 U.S.C. § 365(g), Section 502(b)(1) of the Bankruptcy Code, 11 U.S.C. § 502(b)(1), provides that a claim against an estate in bankruptcy is to be disallowed if such claim "is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." The legal standards for measuring the value of a bankruptcy claim for contract breach are therefore the same as those which would be applied if the bankruptcy had not occurred. In re Nuisance Corp., 17 Bankr. 80, 82 (Bankr. D.N.J. 1981); 3 Collier on Bankruptcy ¶ 502.02 at 502-24 et seq. (15th ed. 1985). A bankrupt in breach of contract pursuant to 11 U.S.C. § 365 may assert any defense to the liability flowing from the statutorily created breach which any other promisor in breach of contract

may assert. Mazirow v. Grigsby (In re White Motor Corp.), 44 Bankr. 563 (N.D. Ohio 1984).

9. The Court must therefore determine the allowability of these claims by applying the appropriate substantive law which would have been applied in the non-bankruptcy context. See, e.g., Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Development Co., 642 F.2d 744, 748 n.8 (5th Cir. 1981); Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 161 (1946).

10. The rejected contracts were entered into pursuant to the Railway Labor Act, 45 U.S.C. §§ 151, et seq., as expressly stated at the outset of each contract. A Railway Labor Act contract, "like the Labor-Management Relations Act § 301 contract, is a federal contract and is therefore governed and enforceable by federal law, in the federal courts." IAM v. Central Airlines, Inc., 372 U.S. 682, 692 (1963). The Supreme Court has also held that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." Textile Workers of America v. Lincoln Mills of Alabama, 353 U.S. 448, 456 (1957). Although the Debtors are subject to the Railway Labor Act, the federal courts have often looked to decisions interpreting the National Labor Relations Act, including § 301 of the LMRA amendments to that Act, for guidance in RLA matters. See generally Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383 (1969) (although NLRA cannot be imported wholesale into the railway labor area, NLRA case law provides "the most relevant corpus of national labor policy"); Japan Airlines Co. v. IAM, 538 F.2d 46 (2d Cir. 1976) (using NLRA Supreme Court decisions to delineate scope of mandatory subjects of bargaining under the RLA).

11. As a matter of federal labor case law, employees subject to a collective bargaining agreement are not entitled to lost future wages as damages under such an agreement when the employer ceases operations, unless the agreement guarantees future employment. See, e.g., J.I. Case v. NLRB, 321 U.S. 332 (1943); Fraser v. Magic Chef-Food Giant Markets, Inc., 324 F.2d 853 (6th Cir. 1963); American Bakery & Confectionery Workers v. Great Atlantic & Pacific Tea Co., 357 F. Supp. 1322 (W.D. Pa. 1973), aff'd mem., 491 F.2d 748 (3d Cir. 1974); Abbington v. Dayton Malleable, Inc., 561 F. Supp. 1290 (S.D. Ohio 1983), aff'd mem., 738 F.2d 438 (6th Cir. 1984); Union de Trabajadores v. Helio San Jeronimo Corp., 434 F. Supp. 643 (D.P.R. 1977); Hotel & Restaurant Employees Alliance, Local 237 v. Alleghney Hotel Co., 374 F. Supp. 1259 (W.D. Pa. 1974). As noted above, the contracts at issue did not guarantee employment, but only provided the terms and conditions applicable to available work. The presence of contract provisions which permitted management to furlough employees appears to confirm that by their own terms these contracts were on their face not guarantees of employment.

12. As a matter of federal labor case law under both the NLRA and the RLA, and as a matter of the common law of contracts in general, no promisee is entitled to more than nominal damages for breach of contract unless that promisee can demonstrate actual injury proximately caused by the breach. IBEW v. A-1 Electrical Services, 535 F.2d 1, 3 (10th Cir.) cert. denied, 429 U.S. 832 (1976); Brotherhood of R.R. Trainmen v. Denver & R.G.W.R. Co., 338 F.2d 407 (10th Cir. 1964), cert. denied, 380 U.S. 972 (1965); Restatement (Second) of Contracts §§ 346-347.

13. As noted above, but for the rejection of the collective bargaining agreements, the Debtors would have ceased operations and flight attendants would have had no cognizable claims for lost future wages because the rejected contracts did not obligate the Debtors to provide employment, but rather only established rates of pay and working conditions for any employment which was available. Federal labor law does not require an award of damages for time periods during which no work would have been available in any event, even where an employee was discharged in violation of the NLRA. See NLRB v. Biscayne Television Corp., 337 F.2d 267, 268 (5th Cir. 1964); Nabors v. NLRB, 323 F.2d 686, 690 (5th Cir. 1964); Midland Ross, Inc., 239 N.L.R.B. 1205 (1979), order enf'd, 653 F.2d 239 (6th Cir. 1981); NLRB v. United Contractors, Inc., 614 F.2d 134, 138 (7th Cir. 1980); NLRB v. Columbia Tribune Publishing Co., 495 F.2d 1384, 1393 (8th Cir. 1974); NLRB v. American Creosoting Co., 139 F.2d 193 (6th Cir. 1943); Brown & Root, Inc., 112 N.L.R.B. 295 (1955); Lauren Burt, Inc. of Colorado, 114 N.L.R.B 295 (1955); Hill Transportation Co., 102 N.L.R.B. 1015 (1953). Under the facts of this case, but for the Court's rejection of the collective bargaining agreements at issue here, the Debtors would have gone out of business and flight attendants represented by UFA could not have claimed lost future wages as damages, because the agreements did not guarantee future employment.

14. Even if UFA's claim for damages are meritorious, UFA damage calculations are flawed. The amount of damages to be awarded for breach of a collective bargaining agreement is limited by both the termination date of the agreement at issue and by the application of 11 U.S.C. § 502(b)(7). The termination date of the contract establishes the ending date for damage calculation purposes.

> The fact that the contract which was breached was due to expire April 30, 1976, is controlling as to the period for which damages may be awarded. Nothing in that contract could have created an expectation that the employees would have continued to enjoy the same wages and benefits beyond the expiration of the contract.

IBT v. Standard Brands, 579 F.2d 1282, 1295 (5th Cir. 1978), cert. denied, 443 U.S. 913 (1979). Accord, UAW v. Roblin Industries, 561 F. Supp. 288, 298 (W.D. Mich. 1983) (rights under agreements can extend beyond expiration date only if agreement so provides); Sun Oil Co. of Pa. v. NLRB, 576 F.2d 553, 558 (3d Cir. 1978); Baker v. Fleet Maintenance, Inc., 409 F.2d 551, 554 (7th Cir. 1969); In re Vic Snyder, Inc., 23 Bankr. 185 (E.D. Pa. 1982). As previously noted, the UFA contracts expired by their own terms on October 1, 1983 (as to DC-9 flight attendants) and December 1, 1984 (as to Boeing 727 and DC-10 flight attendants). UFA's use of May 31, 1986 as the ending date for both contracts in its calculations is based upon its assertions regarding the "average" length of negotiations in the airline industry. These assertions, however, are unsupported by any requisite evidence or appropriate pleading and have not been shown by UFA to bear any relationship here to the "average" length of negotiations at Continental and Texas International Airlines, as the UFA's own witnesses admitted in depositions regarding their calculations. Deposition of C. Lampe at 30-31 (Aug. 14, 1985); Deposition of C. Winkler at 32-33 (Aug. 14, 1985). This is the only evidence before this Court. It appears uncontradicted and was offered by the Debtors. The assertions, the Court concludes, bear no relationship at all to what, in fact, would have happened to Continental, which was not in "average" financial condition, if the contracts had not been rejected.

15. Continental's obligation, under the Railway Labor Act, to maintain the "status quo" after the contracts expired is excused by the Bankruptcy Code. NLRB v. Bildisco & Bildisco, 104 S. Ct. 1188 (1984) (despite statutory obligation to maintain wages and working conditions provided for in collective bargaining agreement, Chapter 11 debtors may unilaterally lower wages prior to order rejecting the agreement); Memorandum of Authorities Authorizing Rejection of Air Line Pilots Association on Collective Bargaining Agreements (August 17, 1984) at 30-40.

16. An addition to the restriction on damages created by the term of the contract, Section 502(b)(7), 11 U.S.C. § 502(b)(7), further limits damages for breach of "employment contracts" to a maximum of one year's compensation. Collective bargaining agreements are "employment contracts" within the meaning of 11 U.S.C. § 502(b)(7). In re Cortland Container Corp., 30 Bankr. 715 (Bankr. N.D. Ohio 1983).

17. UFA's reliance on the Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137 (1973), to argue that Section 502(b)(7) does not apply to collective bargaining agreements is patently unpersuasive. In that Report, a commission (not the U.S. Congress) described a provision similar to what became Section 502(b)(7) as "principally" (not exclusively) intended to apply to long-term management contracts, and to the termination of contracts for future "athletic, entertainment or other services." The language under discussion itself indicates that the commission did not intend the cap provision to apply only to such contracts. Moreover, the report in question is not part of the legislative history of the 1978 Bankruptcy Code at all, but is a report of a national commission on bankruptcy which concluded its proceedings five years before the 1978 Code was enacted. As

enacted, § 502(b)(7) contains no limitation to "management," "entertainment" or "sports" contracts. The legislative history of the 1978 Code reflects only an intention to track a similar provision on leases, which had placed a cap on the damages which might be claimed for the rejection of a lease to prevent unjust enrichment of a lessor. H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 352-354 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 62-65 (1978).

18. No affidavits or other admissable evidence have been offered to establish that there is a genuine dispute as to material fact. Because this Court is persuaded that Continental is entitled to judgment as a matter of law, summary judgment is appropriate and will be granted. Federal Rules of Civil Procedure 56(e).

19. For the foregoing reasons, the Union of Flight Attendant's claim for contract rejections damages will be disallowed in its entirety.

20. This Court further rules that the value of UFA's claim for contract rejection damages, pursuant to its proof of claim, is estimated, pursuant to 11 U.S.C. § 502(c) to be zero based upon the Court's conclusion that these claims are ultimately without merit.

The Court would note that even if the damages for breach of the collective bargaining agreements were deemed appropriate, UFA's contract rejection damages claims would be limited to the lesser of one year's compensation or the compensation due under the contracts from September 24, 1983 to the date that the contract was no longer effective by its own terms. In the case of the DC-9 contract, damages would thus be limited to compensation for the period September 24, 1983 to October 1, 1983, the

specified expiration date. In the case of the Boeing 727 and DC-10 contract, damages could be no greater than one year's compensation as provided in the Bankruptcy Code, Section 502(b)(7).

These Findings of Fact and Conclusions of Law are hereby incorporated in and made a part of the order attached hereto. It is so

ORDERED AND ADJUDGED this 8th day of May, 1986.

/s/ T. Glover Roberts
UNITED STATES BANKRUPTCY JUDGE